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COMMONWEALTH OF MASSACHUSETTS
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MASSACHUSETTS REPORTS

207

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS

OCTOBER 1910—FEBRUARY 1911

HENRY WALTON SWIFT

REPORTER

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JUSTICES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

HON. MARCUS PERRIN KNOWLTON, CHIEF JUSTICE.
HON. JAMES MADISON MORTON.
HON. JOHN WILKES HAMMOND.
HON. WILLIAM CALEB LORING.
HON. HENRY KING BRALEY.
HON. HENRY NEWTON SHELDON.
HON. ARTHUR PRENTICE RUGG.

ATTORNEYS GENERAL

HON. DANA MALONE.
HON. JAMES MARCUS SWIFT.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

GEORGE ADAMS WOODS *vs.* JOHN G. LOWE.

Suffolk. November 18, 1909. — October 28, 1910.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, BRALEY, SHELDON, & RUGG, JJ.

Agency, Broker's commission. *Practice, Civil*, Exceptions, Verdict.

In an action by a broker to recover a commission for making a sale of certain real estate of the defendant, where it appeared that the defendant put the property into the hands of the plaintiff for sale, that the plaintiff procured an offer which afterwards was withdrawn and that later the defendant sold the property through another broker for a lower price to the person from whom the plaintiff procured the first offer, there was conflicting evidence upon the questions whether the plaintiff's employment had been terminated in good faith by the defendant before the sale, and whether, if it had not, the plaintiff was the efficient and predominating cause of the sale or whether such cause was the second broker, and the presiding judge gave proper instructions upon these questions to the jury, who returned a verdict for the plaintiff. *Held*, that these were questions of fact and properly were left to the jury.

Where a verdict for a plaintiff shows by the amount of the damages given that the jury did not find a certain fact, an exception of the defendant to an instruction to the jury, that if they found such fact to exist they might return a verdict for the plaintiff, cannot be sustained, as, even if the instruction was erroneous, the defendant was not harmed by it.

Where in an action of contract, in which the jury returned a verdict for the plaintiff, the rules of law governing the liability of the defendant were correctly laid down by the presiding judge, an additional remark of the judge not material to the decision of the case affords the defendant no ground for exception, whether it was correct or not, because the jury will be presumed to have followed the correct instructions given to them upon the issues before them, especially where they were warned by the judge that the subject of the remark was something about which they should not concern themselves.

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MORTON, J. This is an action to recover a broker's commission on a sale of certain real estate situated on Cornhill in Boston and belonging to the defendant. There was a verdict for the plaintiff, and the case is here on exceptions by the defendant to the refusal of the presiding judge * to give certain rulings that were requested and to certain portions of the charge. There was also an exception to the admission of evidence; but that has not been pressed and we treat it as waived.

There was no dispute as to the rate per cent of the commission that was to be paid, and, according to the plaintiff's testimony, which was not contradicted by the defendant, what the plaintiff was employed to do was to effect a sale of the property at a price to be agreed upon between the purchaser and the defendant. The plaintiff testified "that the defendant stated that he would like to have us sell this property for him." On cross-examination he testified that the asking price was to be $78,000, but that he was to submit offers to the defendant.

There was testimony tending to show that, after the property was put into his hands, the plaintiff entered into negotiations with one Martin for its purchase. The plaintiff contended, and so testified, that as a result of the negotiations Martin agreed to buy and the defendant agreed to sell the property to him for $65,000, but that before the sale was consummated by a transfer of the title and before a binding written agreement was executed, Martin withdrew the offer and made an offer of $62,500, or $62,000 (the plaintiff was uncertain which), which offer was communicated to the defendant but was not accepted by him. It appeared that the property was subsequently sold to Martin through another broker for $60,000. Martin denied that he ever made an offer of $65,000 for the property, or that he agreed to purchase the property and pay that amount for it, and the defendant testified that the offer of $62,500, or $62,000, never was reported to him. There was testimony tending to show that both the plaintiff and the defendant were greatly dissatisfied with Martin's conduct in withdrawing his alleged offer of $65,000, and the defendant testified that the plaintiff said that he would have nothing more to do with Martin, and that it was not until after that that the defendant spoke to Behneke, the

* *Wait*, J.

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broker who actually made the sale. The plaintiff's testimony tended, or at least it could have been found that it tended, to show that it was the defendant and not the plaintiff who declared his intention to have nothing more to do with Martin, and that the plaintiff continued his efforts as broker to sell the property.

In order to entitle him to recover, the plaintiff was bound to show that there was a sale, that he was rightfully acting for the defendant as a broker when the sale was made, and that he was the efficient and predominating cause of the sale. There was no doubt about the sale, and the principal questions were whether the plaintiff's employment had been terminated in good faith by the defendant before the sale, and whether, if it had not, the plaintiff was the efficient and predominating cause of the sale, or whether it would not have taken place at all if it had not been for Behneke. These were questions of fact for the jury, and it would have been error to rule, as requested in substance by the defendant, that there was no evidence warranting a verdict for the plaintiff.

The jury were expressly told that if the plaintiff said that he would have no more to do with Martin the defendant had a right to take him at his word and to employ another broker and to sell the property, if he could, to Martin; and that under such circumstances the plaintiff would not be entitled to a commission on the sale. The jury must have understood from this that if the plaintiff's employment had been terminated, as contended, the plaintiff was not entitled to recover for anything that he had done in the way of introducing Martin to the defendant or in bringing the property to Martin's attention, or in entering into negotiations with him, and no special instructions in relation thereto were required. Further, there was no contention on the part of the plaintiff that he was entitled to a commission for having produced a customer to the defendant. His whole case rested on the ground that he was employed to effect a sale, that there was no termination of his employment, and that he was the efficient cause of the sale that was made. The jury were also instructed that if the sale was due to the interposition of Behneke and it would not have taken place except for him, and he brought it about, then the

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plaintiff would not be entitled to recover; but that if his employment with reference to Martin had not been terminated, they would be justified in finding that he was the efficient cause of the sale if they were satisfied that it was in consequence of what he did "chiefly and principally though not absolutely and entirely" that the sale was made. They were still further instructed that if there was a *bona fide* offer of $62,000 made to the plaintiff by Martin which the plaintiff wrongfully failed to communicate to the defendant and the defendant was thereby injured, then the plaintiff would have failed in the performance of his duty and would not be entitled to recover.

We do not see how any fault can be justly found by the defendant with these instructions, or how it can be justly said that the issues that were presented were not dealt with in an adequate manner. See *Cohen* v. *Ames*, 205 Mass. 186, and cases cited. No objection was made that the plaintiff was not entitled to recover under the declaration as it stood for a commission on the amount for which the property was actually sold.

The defendant objects to that portion of the charge which allowed the jury to return a verdict for the plaintiff if they found that an agreement was entered into between Martin and the defendant for the sale of the property for $65,000. But it is plain from the verdict, which was for $600 and interest, or one per cent on $60,000, the amount for which the property was sold, that the jury did not find that there was an agreement to sell and buy for $65,000, and therefore, without going further, it is enough to say that the defendant was not harmed by the instruction objected to.

Exception was also taken to the statement in the charge as to the difficulty which a person employing a broker may have in deciding whom to pay, and that "it might often be that a commission would be due, under certain circumstances, to two persons." But the remark, whether true or not, could have done the defendant no harm, since the rules governing the liability of the defendant in the case before the court were correctly laid down and must be presumed to have been followed by the jury.

The jury were told in substance and effect that to entitle the plaintiff to recover it must appear that the sale was brought about by him and that he was the efficient cause of it. Con-

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versely they were told that the plaintiff would not be entitled to recover if the sale was brought about by Behneke and would not have taken place but for his interposition. And in one instance at least they were told that the plaintiff could not recover unless he was the sole cause of the sale. He could not be the sole cause of the sale without being the efficient and predominating cause of it. The jury were also instructed that the plaintiff would not be entitled to recover notwithstanding his relations with Martin had not been terminated, "if as a matter of fact Mr. Behneke was the person who actually made the sale" and "if it was the result of Behneke's exertion that the sale was carried through." And they were still further instructed that "whether or not Mr. Lowe [the defendant] would have to pay two persons, or would lose what he had paid to Mr. Behneke if Mr. Woods recovers, is something you should not concern yourselves about. The question is, does he owe Mr. Woods?" In view of these and other instructions we do not see how the jury could have found for the plaintiff unless they found that he was the efficient cause of the sale, that it was brought about by him and not by Behneke, and that his relations to Martin and the defendant had not been terminated when the sale was made. And if they did so find, then the plaintiff was entitled to recover notwithstanding the statement that a commission might, under some circumstances, be due to two persons, and even though the jury might have understood that the statement was applicable to the case before them.

The result is that we discover no reversible error in the conduct of the trial.

Exceptions overruled.

The case was argued at the bar in November, 1909, before *Knowlton*, C. J., *Morton*, *Braley*, *Sheldon*, & *Rugg*, JJ., and afterwards was submitted on briefs to all the justices.

J. E. Hannigan, for the defendant.

G. C. Coit, for the plaintiff.

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EDWARD H. LATHROP, administrator with the will annexed, *vs.* EDWARD H. MERRILL & another.

Hampden. September 27, 1910. — October 28, 1910.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Devise and Legacy. Restraint on Alienation. Assignment.

A testatrix by her will first gave to her nephew E. $3,000 and to her nephew H. $2,000, and then provided as follows: "Second: I give to my son F. $2,000. Also I give to my executor all the rest, residue and remainder of my estate to pay over the entire income thereof to my son F. during his life. Third: After the death of my son I give to" [four charitable corporations $500 each]; "to [my nephew] E. $3,000; and to [my nephew] H. $2,000. Should there be anything then remaining, I direct that it be divided equally among the six legatees mentioned in this clause. Fourth: I direct that all gifts, whether of principal or income made in this will, should not be alienable by the legatee, nor subject to interference by creditors, until paid to the legatee." During the lifetime of the son of the testatrix, the nephew E. executed an assignment in writing under seal of all his right and interest as legatee under the will. After the death of the son, the administrator with the will annexed of the estate of the testatrix brought a bill for instructions, as to whether he should pay the legacy of this nephew to the nephew himself or to his assignee under the assignment named above. *Held*, that the interest of the nephew under the will was an absolute legal interest, on which the clause of the will attempting to restrain alienation had no effect, and therefore that it passed by the assignment.

BILL IN EQUITY, filed in the Supreme Judicial Court on March 17, 1910, by the administrator *de bonis non* with the will annexed of the estate of Lucy A. Fuller, late of Springfield, for instructions.

The bill alleged that by the first clause of the will the defendant Merrill was given $3,000, to be paid at the convenience of the executor; that the plaintiff paid that sum to the defendant Merrill on November 9, 1898, and at that time received from the defendant Merrill a full discharge under seal from the payment of that sum and also in full receipt and discharge of all legacies under said will; that by the third clause of the will the sum of $3,000 was bequeathed to the defendant Merrill after the death of the son of the testatrix Lucy A. Fuller, Francis H. Fuller by name, who had a life interest in the income thereof; and that the defendant also was given an interest in the estate remaining

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after the payment of the amounts specifically named to certain residuary legatees; that on or about September 17, 1900, and while Francis H. Fuller still was alive, the defendant Merrill executed and delivered to the defendant Ida K. Fuller an assignment under seal of his entire interest coming to him then or thereafter of all moneys by virtue of the third clause of the will of Lucy A. Fuller, together with full power and authority to execute any and all instruments and make all necessary discharges; and that Francis H. Fuller afterwards died.

The bill prayed for instructions as to whether there had or had not been any effectual assignment of the whole or any part of the interest of the defendant Merrill to the defendant Ida K. Fuller; and as to whom the plaintiff should pay the amount bequeathed in the residuary clause to the defendant Merrill.

The will of Lucy A. Fuller was as follows:

"I, Lucy A. Fuller of Springfield, Massachusetts, make this my last will, revoking all previous wills.

"First: I give to my nephew, Edward F. Merrill, Three Thousand Dollars ($3000) and to my nephew Henry C. Merrill Two Thousand Dollars ($2000) to be paid at the convenience of my executor.

"Second: I give to my son Francis H. Fuller Two Thousand Dollars. Also I give to my executor all the rest, residue and remainder of my estate to pay over the entire income thereof to my son Francis H. Fuller during his life.

"Third: After the death of my son I give to the Springfield Young Men's Christian Association Five Hundred Dollars ($500); to the Woman's Board of Missions connected with the American Board of Commissioners for Foreign Missions Five Hundred Dollars; to the Hampden County Children's Aid Society Five Hundred Dollars; and to the American Home Missionary Society Five Hundred Dollars; to Edward F. Merrill Three Thousand Dollars; and to Henry C. Merrill Two Thousand Dollars.

"Should there be anything then remaining, I direct that it be divided equally among the six legatees mentioned in this clause.

"Fourth: I direct that all gifts, whether of principal or income made in this will, should not be alienable by the legatee, nor subject to interference by creditors, until paid to the legatee.

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"Fifth: I appoint Henry S. Lee and Ralph W. Ellis to be executors of this will without sureties on their official bonds and with authority to sell real estate to settle my estate.

"Witness my hand and seal this 25th day of January, 1895."

Here followed the signature and seal of the testatrix and an attesting clause with the signatures of three witnesses.

The assignment of September 17, 1900, to the defendant Ida K. Fuller was executed under seal by the defendant Edward F. Merrill and contained the following: "I do hereby assign, transfer and set over unto the said Ida K. Fuller all claims and demands which I now have or may hereafter have against the estate of Lucy A. Fuller, late of Springfield, Hampden County, Massachusetts, under and by virtue of the will of said Lucy A. Fuller; and I do hereby assign, transfer and set over unto the said Ida K. Fuller all my rights and interest as legatee under the will of the said Lucy A. Fuller, and all the monies coming to me now or hereafter as legatee under the will of the said Lucy A. Fuller, I hereby assign, transfer and set over unto the said Ida K. Fuller; and more particular all rights and interests which I now have or may hereafter at any time have under and by virtue of the third clause of the will of the said Lucy A. Fuller I hereby assign, transfer and set over unto the said Ida K. Fuller, with full power and authority to execute any and all instruments and make all necessary discharges."

The receipt of Edward F. Merrill for the $3,000 bequeathed to him by the first clause of the will, mentioned in the opinion, was executed under seal by the defendant Merrill on November 9, 1898, and, with the omission of the attesting clause, was as follows: "Received of Edward H. Lathrop, Administrator with the will annexed of Lucy A. Fuller the sum of Three Thousand (3,000) dollars being the legacy made to me in said will and in full consideration thereof; and in full discharge of said administrator from the payment thereof and also in full receipt and discharge of all legacies under said will."

The case was submitted on briefs.

C. H. Barrows, for the defendant Edward F. Merrill.

J. B. Carroll, W. H. McClintock & J. F. Jennings, for the defendant Ida K. Fuller.

LORING, J. The question upon which the rights of the defend-

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ants in this case depend is this: Were the interests which the legatees took under the third clause of the will legal or equitable interests?

A testator cannot qualify a devise of a legal estate in land or a bequest of an absolute legal interest in personal property by a provision that the devisee's estate or the legatee's interest shall not be alienated nor taken for his debts. Of that there never has been and is not now any doubt. Co. Lit. 223 a. *Blackstone Bank* v. *Davis*, 21 Pick. 42. *Gleason* v. *Fayerweather*, 4 Gray, 348. *Lane* v. *Lane*, 8 Allen, 350. *Broadway National Bank* v. *Adams*, 133 Mass. 170, 171. *Todd* v. *Sawyer*, 147 Mass. 570. *Winsor* v. *Mills*, 157 Mass. 362, 363, 364. *Butterfield* v. *Reed*, 160 Mass. 361. *Cushing* v. *Spalding*, 164 Mass. 287. See also *Ide* v. *Ide*, 5 Mass. 500; *Bassett* v. *Nickerson*, 184 Mass. 169; *Galligan* v. *McDonald*, 200 Mass. 299.

On the other hand it must be taken now to be settled in this Commonwealth that in case of the devise of an equitable fee in land or the bequest of an equitable interest in personal property the rule which originated in *Broadway National Bank* v. *Adams*, 133 Mass. 170, obtains, and limitations against alienation and forbidding the property to be taken for the debts of the devisee or legatee are valid. *Claflin* v. *Claflin*, 149 Mass. 19. *Young* v. *Snow*, 167 Mass. 287. *Danahy* v. *Noonan*, 176 Mass. 467. *Hoffman* v. *New England Trust Co.* 187 Mass. 205. *Dunn* v. *Dobson*, 198 Mass. 142.

Had the gift of the residue to the son of the testatrix been in terms a gift to him for life, the residue would have been held by the executor during the life of the son, the income of it would have been paid by him to the son during his life, and on his death the residue would have been paid over by the executor to the legatees to whom it was given on the son's death. *Dorr* v. *Wainwright*, 13 Pick. 333, 338. *Field* v. *Hitchcock*, 17 Pick. 182, 183. *Homer* v. *Shelton*, 2 Met. 194, 206. *Johnson* v. *Bridgewater Iron Manuf. Co.* 14 Gray, 274. *Lewis* v. *Shattuck*, 173 Mass. 486. The gift over in that case would have been a bequest of a legal interest for which the legatee could have brought an action of contract. R. L. c. 141, § 19. We do not think that the language of Field, J., in *Hooper* v. *Bradbury*, 133 Mass. 303, 307, should be taken to mean anything more than that the relation

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between the executor and the life tenant in such a case is a trust or in the nature of a trust.

We must assume on this record that the residue consisted entirely of personal property. The bill is brought by an administrator with the will annexed as such, for instructions as to the distribution of "assets" in his hands.

All the personal property of a testator vests in his executor by the probate of the will. *Hays* v. *Jackson*, 6 Mass. 149, 152. *Dawes* v. *Boylston*, 9 Mass. 337, 352. *Clapp* v. *Stoughton*, 10 Pick. 463, 468. It is sometimes said that an executor holds as trustee for the legatees. But all that is meant by that is that he holds title to his testator's goods in *autre droit*, *Weeks* v. *Gibbs*, 9 Mass. 74, 75, 76, and not in his own right. The right of those for whom he holds is a legal not an equitable right, and is enforced by an action at law. R. L. c. 141, § 19.

The bequest to the executor to pay the income to the son of the testatrix for life had no more effect than a devise to an heir. The result in the case at bar is the same as if there had been no bequest to the executor. This seems to have been assumed in the administration of the estate of the testatrix. The residue seems to have been administered by the administrator with the will annexed as such.

The result is that the gifts over after the son's life estate were gifts of an absolute legal, not of an absolute equitable, interest.

The remaining question is this: Since the fourth clause of her will shows that the testatrix intended all legacies to be inalienable and not subject to be taken for the legatees' debts, why should not the legacies given by the third clause be construed to be equitable and not legal interests in order that that intention of hers may be carried into effect? The first answer to this contention is that the province of the court is not to conjecture what the testator's intention was and then read it into the will, but to ascertain his intention by construing the words which he used as the declaration of it. See in this connection *Child* v. *Child*, 185 Mass. 376, 378. The gifts made by the third clause are in terms bequests of legal interests, to be paid over by the executor as executor. The case at bar is quite different from the case which would have been presented if the testatrix had devised

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and bequeathed the residue of her property real and personal, or even if she had bequeathed the residue of it, consisting of personal property only, to a third person in trust to pay the income to her son for life, and upon his death to convey, pay over and distribute, or to pay over and distribute, the principal to and among the persons named in the fourth clause of her will. The duty of paying over on the son's death was no part of the trust described in the second clause. That was left to be done by the executor exactly as if the gift to the son for life had been made without a bequest to the executor to carry it into effect. And in the second place, if the court were at liberty to enter upon this field of conjecture it is hard to believe that the testatrix intended to provide that the legacies (1) to the Young Men's Christian Association, (2) to the Woman's Board of Missions, (3) to the Children's Aid Society, and (4) to the Home Missionary Society should be inalienable and not subject to the legatees' debts. The legacy here in question and that to Henry C. Merrill stand on the same footing as the legacies to these charitable organizations. These considerations would lead the court to conjecture that it was not the intention of the testatrix in the case at bar to have the fourth clause apply to all legacies. But (as we have said) her intention must be ascertained by construing the words used by her as her declaration of it. So ascertained, it was her intention that the provisions of the fourth clause should apply to all legacies given by the will.

It has not been contended that Edward F. Merrill released his rights under the third clause of the will by giving under seal a "full receipt and discharge of all legacies under said will" when he received payment of the legacy bequeathed to him in the first clause of it.

It follows that the interest assigned by Edward F. Merrill to Ida K. Fuller was a legal interest, the assignment of it was a valid one, and the plaintiff should be directed to pay to her all sums due him under the third clause of the will.

So ordered.

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JOHN H. MENUT *vs.* BOSTON AND MAINE RAILROAD.

Essex. October 17, 1910. — November 21, 1910.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Railroad. Fence. Negligence, Railroad. *Statute*, Construction. *Words*, "Suitable fences."

Review by BRALEY, J., of the statutes and of the decisions of this court with regard to the duty of railroad corporations to maintain fences upon both sides of the entire length of their railroads.

Section 120 of R. L. c. 111, now St. 1906, c. 463, Part II. § 103, which requires every railroad corporation to "erect and maintain suitable fences, with convenient bars, gates or openings therein, upon both sides of the entire length of its railroad," with certain exceptions, imposes no duty upon railroad corporations to prevent, by the maintenance of such fences, the owners of premises adjoining the railroads, or persons rightfully upon such premises, from falling down embankments along the railroads.

The history of St. 1906, c. 463, Part II. § 103, which provides that "every railroad corporation shall erect and maintain suitable fences, with convenient bars, gates or openings therein, upon both sides of the entire length of its railroad," with certain exceptions, requires that the words "suitable fences," therein shall be construed to mean fences suitable to protect the cattle of adjoining landowners and to prevent their intrusion upon the railroad locations; and, if the agricultural conditions which prevailed when the development of the railroad law of the Commonwealth began and for some time afterwards very largely have changed and the statutory regulations relating to the operation of railroads should be made more rigorous, as to places where the population has become increasingly urban and more dense, by the imposing of additional safeguards through the erection of barriers or the prescribing of what shall constitute a lawful fence for the personal safety of those who may live on estates adjoining or in proximity to the railroad location or may use the public ways contiguous and parallel to it, such change should come, not from an alteration in the judicial construction of the statute, but only from further legislation.

TORT for personal injuries. Writ dated June 3, 1909.

The declaration was in substance as follows:

"And the plaintiff says that the defendant is a corporation owning and operating a railroad in Lynn . . .; that it is the duty of said defendant, and said defendant is required by R. L. c. 111, § 120, to 'erect and maintain suitable fences, with convenient bars, gates or openings therein, upon both sides of the entire length of its railroad except at the crossings of a public way or in places where the convenient use of the road would be thereby obstructed, and except at places where, and so long as, it

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is specially exempted from the duty of so doing by the board'; yet said defendant, not being exempted from such duty as provided in said § 120, did on or about May 23, 1904, and a long time before that time, carelessly and negligently fail to erect and maintain a fence as provided in said chapter upon the side of its railroad adjoining the premises at or near 52 1-2 Silsbee street in said Lynn; and said premises not being on a crossing of a public way or a place where the convenient use of the road of the defendants would be obstructed by the erection of a fence as aforesaid, are, and were on or about May 23, 1904, wholly unprovided with any fence as aforesaid; that on or about May 23, 1904, the plaintiff was lawfully and rightfully upon the premises adjoining the railroad of said defendant situated at or near 52 1-2 Silsbee street in said Lynn, for, by leave of, under, and in the right of the adjoining land owner, and in the employ of and with the consent of said adjoining land owner, in the regular course of his employment by said land owner, and in the course of his business for said land owner; and that while he was so working on the said premises adjoining the road of the defendant, and while himself in the exercise of due care, he was thrown from a pile of lumber situated on the said premises, and in falling fell over the stone wall of said defendant and on to the ground of the road of said defendant, and was severely injured owing to the negligence of the defendant, its servants, or agents, in failing to erect and maintain a fence on said premises as provided in R. L. c. 111, § 120, which said fence, if erected and maintained, would have caught said plaintiff as he fell from the pile of lumber and prevented his falling over the stone wall to the ground below; that on or about May 23, 1904, owing to the negligence of the defendant, its servants or agents as aforesaid, and while himself in the exercise of due care, he was severely and permanently injured, and suffered greatly both in body and in mind, and was put to great expense for medicines and medical attendance, all to his damage as alleged."

The defendant demurred, the first ground of demurrer being that "no legal cause of action" was set forth in the declaration. The demurrer was heard by *Dana*, J., who made an order sustaining it. Judgment was entered for the defendant; and the plaintiff appealed.

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The case was submitted on briefs.

E. M. Schwarzenberg & E. F. Schwarzenberg, for the plaintiff.

H. F. Hurlburt & D. E. Hall, for the defendant.

BRALEY, J. The plaintiff, having no cause of action at common law, seeks to hold the defendant in damages for personal injuries caused by a failure to comply with R. L. c. 111, § 120, that "every railroad corporation shall erect and maintain suitable fences, with convenient bars, gates or openings therein, upon both sides of the entire length of its railroad, except at the crossings of a public way or in places where the convenient use of the road would be thereby obstructed, and except at places where, and so long as, it is specially exempted from the duty of so doing by the board" of county commissioners. "The corporation shall also construct and maintain sufficient barriers, where it is necessary and practicable so to do, to prevent the entrance of cattle upon the road. A corporation which unreasonably neglects to comply with the provisions of this . . . section shall, for every such neglect, forfeit not more than two hundred dollars for every month during which the neglect continues; and the Supreme Judicial Court shall have jurisdiction in equity to compel the corporation to comply with such provisions, and, upon such neglect, to restrain and prohibit it from crossing a highway or town way, or from using any land, until such provisions shall have been complied with." *Rust* v. *Low*, 6 Mass. 90, 93. *Thayer* v. *Arnold*, 4 Met. 589. *Eames* v. *Salem & Lowell Railroad*, 98 Mass. 560. *Baxter* v. *Boston & Worcester Railroad*, 102 Mass. 383. *Bronson* v. *Coffin*, 108 Mass. 175. See St. 1906, c. 463, Part II. § 103.

It is not sufficient for the plaintiff to prove that the defendant failed to fence, and if this had been done he would not have been injured, but he must go further and show, that the requirement of the statute was enacted for his benefit. The inquiry, therefore, is, whether it was the defendant's duty to erect and maintain at the place of the accident a fence which would have been sufficient to have intercepted the plaintiff's fall, and prevented his injuries. If this is established the further averments of its negligence are admitted by the demurrer.

The language imposing the duty does not define its scope, and to ascertain the proper construction, the statute must be read

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with the provisions of the original enactments from which it has been derived. The earlier acts of incorporation contain some provisions for adapting the railroad at the expense of the corporation to the grade of intersecting highways which must be raised or lowered to meet the change in level, and the Sts. of 1833, c. 187, 1834, c. 137, and 1835, c. 148, provided for the assessment of damages if the location was acquired by eminent domain; and that at grade crossings certain precautions should be taken for the safety of travellers on highways. But no attempt at a general system of statutory law for the construction and operation of railroads appears until the Rev. Sts. c. 39. Mass. Special Laws, Sts. 1829, cc. 93, 94, 95; 1830, c. 4; 1831, cc. 55, 56, 57, 72; 1832, cc. 49, 80, 87; 1833, cc. 109, 116, 118; 1835, cc. 95, 111; 1836, cc. 187, 221, 236, 249, 267. The revision, however, did not require either party to fence, although under the general powers of the county commissioners, by whom damages were assessed, they could direct that instead of an award in money to the landowner for the cost as in the taking of land for a highway, the corporation should provide and maintain the necessary fences. *First Parish in North Bridgewater* v. *Plymouth*, 8 Cush. 475. *Morse* v. *Boston & Maine Railroad*, 2 Cush. 536. *Boston & Worcester Railroad* v. *Old Colony Railroad*, 12 Cush. 605, 608, 609. *Baxter* v. *Boston & Worcester Railroad*, 102 Mass. 383. If money damages were awarded, and the land remained unfenced, besides incurring the danger of injury to his cattle, for which he would have no remedy, the landowner also might be held liable to suit if passing to the track they caused the derailment of trains. *Lyons* v. *Merrick*, 105 Mass. 71, 76. *Lovett* v. *Salem & South Danvers Railroad*, 9 Allen, 557, 562. But if either party was dissatisfied, and applied for a jury the order was vacated, and as the verdict might not require the erection of fences the corporation could not be compelled to act, and the landowner must provide them. It was to guard against such results in the future, as well as to furnish a remedy to "any owner of land heretofore taken," that the St. of 1841, c. 125, was passed. The corporation, in addition to the pecuniary damages assessed upon it, was now required "to construct and maintain such embankments, drains, culverts, walls, fences, or other structures, as said commissioners shall judge rea-

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sonable for the security and benefit of such landowners. And in their order, therefore, the commissioners shall prescribe the time within which, and the manner how, such structure shall be made or repaired, which order it shall not be competent for a jury to alter or reverse." *Boston & Providence Railroad* v. *Doherty*, 154 Mass. 314. By § 4, the commissioners were authorized on "the application of any owner of land heretofore taken" or of the selectmen of the town through which the railroad passed, to require suitable fences to be made and maintained by the corporation, "as well for the benefit and security of such landowner, as of travellers on such railroad," unless the landowner already had received in the assessment of damages full compensation, or had agreed to make and maintain such fence, yet no right is conferred upon the corporation or the commissioners to compel him to fence, although compensated for the outlay, or where the land having been obtained by purchase the price paid was presumed to include the cost of fencing by the grantor. *Morse* v. *Boston & Maine Railroad*, 2 Cush. 536. *Stearns* v. *Old Colony & Fall River Railroad*, 1 Allen, 493. But as the corporation was not required to act unless ordered by the commissioners, and the landowner content with the compensation received could remain quiescent, while passengers might be exposed to great peril during transportation on a partially or wholly unfenced track, the St. of 1846, c. 271, § 3, to do away with this serious danger, directed under a penalty provided by § 4, that "every railroad corporation shall erect and maintain suitable fences with convenient bars, gates, or openings therein, at such places as may reasonably be required, upon both sides of the entire length of any railroad which they may hereafter construct, except at the crossings of any turnpike, highway, or other way, or in places where the convenient use of the railroad would be obstructed thereby. And shall also construct and maintain sufficient barriers, at such places as may be necessary, where it is practicable to do so, to prevent the entrance of cattle upon the railroad." See *Boston & Worcester Railroad* v. *Old Colony Railroad*, 12 Cush. 605, 609. The duty thus imposed was subsequently made enforceable in equity by this court under St. of 1855, c. 350, and these statutes, having been consolidated in Gen. Sts. c. 63, §§ 40 to 43, and the St. of 1874, c. 372, §§ 83, 84, have been uniformly

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construed where the road was built prior to April 17, 1841, as requiring the owner to fence if his damages, or the price paid to him where the acquisition was by purchase, included the cost of fencing, and where the road was constructed after May 16, 1846, the corporation fenced the entire length of the railroad on both sides except in places where a fence would obstruct the convenient use of the railroad, or at crossings where the general public had a right of way. *Morse* v. *Boston & Maine Railroad*, 2 Cush. 536. *Stearns* v. *Old Colony Railroad*, 1 Allen, 493. *Boston & Albany Railroad* v. *Briggs*, 132 Mass. 24. The exemption, however, was repealed by the St. of 1879, c. 205, which finally put upon the corporation the absolute and sole duty of maintaining the fence, and where by either law or contract this burden before had been placed on the adjoining landowner, the corporation was required thereafter to erect such fences, or to keep them in repair if they had been erected, and could recover the reasonable cost in an action of contract or by a lien upon the land for the labor and materials. The Pub. Sts. c. 112, § 115, and the R. L. c. 111, § 120, are re-enactments of these provisions, which from the first to the last enactment prescribe neither the dimensions, material or mode of construction, except as may be inferred from the words that it shall be a "suitable fence."

It is common observation, that a railroad often runs through extensive tracts of woodland and unimproved lands, and, as a fence which there might be sufficient to comply with the statute would be wholly insufficient between coterminous owners of lands under cultivation, *Eames* v. *Salem & Lowell Railroad*, 98 Mass. 560, 565, decided, that the fence defined in Gen. Sts. c. 25, § 1, now R. L. c. 33, § 1, was not the standard of requirement. The "security and benefit" of the landowner, and "of travellers on such railroad," having been the words of the statute of 1841, there would seem to be no reasonable ground to question, that, under the original act and subsequent statutes which indicate no change of purpose, a fence sufficient to turn the cattle of those whose lands adjoined the road, was all that the Legislature intended.

The railroad company also in the operation of its trains has the right to the exclusive use of its tracks, and is under no obligation to anticipate the intrusion of cattle which may have

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passed unlawfully to the location, even where there has been a neglect to fence or the fence may be insufficient to restrain them, and if injured or destroyed the corporation is not responsible to the owner unless wanton or reckless misconduct of its servants or agents is shown. *Eames* v. *Salem & Lowell Railroad*, 98 Mass. 560. *Maynard* v. *Boston & Maine Railroad*, 115 Mass. 458. *McDonnell* v. *Pittsfield & North Adams Railroad*, 115 Mass. 564. *Darling* v. *Boston & Albany Railroad*, 121 Mass. 118. *Towne* v. *Nashua & Lowell Railroad*, 124 Mass. 101, 104. *Taft* v. *New York, Providence & Boston Railroad*, 157 Mass. 297. The case of *Browne* v. *Providence, Hartford & Fishkill Railroad*, 12 Gray, 55, did not arise under our statute, but as pointed out in *Eames* v. *Salem & Lowell Railroad*, 98 Mass. 560, 564, rested on the construction of a statute of Connecticut, under which suit had been brought in our courts. See *Isbell* v. *New York & New Haven Railroad*, 27 Conn. 393. This doctrine has been applied to persons, and no distinction has been made in suits for personal injuries by adults, or by plaintiffs of tender years, who have passed or strayed to the tracks through openings in the fence on the side of the railroad which were not shown to have been necessary for its convenient operation, or for crossings to accommodate the public ways, or a place which by implication the public had been invited to use. *Wright* v. *Boston & Maine Railroad*, 129 Mass. 440. *Morrissey* v. *Eastern Railroad*, 126 Mass. 377, 380. *Wright* v. *Boston & Albany Railroad*, 142 Mass. 296. *Chenery* v. *Fitchburg Railroad*, 160 Mass. 211, 213. See *McCarty* v. *Fitchburg Railroad*, 154 Mass. 17. And since the St. of 1853, c. 414, § 4, it has been a misdemeanor for any person without right knowingly to stand or walk on a railroad track. If the erection and maintenance of a fence was also designed for the protection of the public generally, and the failure to fence was the proximate cause of the injury, the plaintiffs were not barred, and as proof of their due care, or of those responsible for his conduct where the plaintiff appears to have been unable to care for himself, would have been all that was necessary to have established the defendant's liability, they should have been permitted to recover. But it is evident from these decisions, that the railroad was not required to assume that trespassers might be on the track or to fence for their protection, and we never have

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adopted the view, that, if a trespasser is a child of immature age or so young as to be incapable of caring for himself, the company is called upon to anticipate and discover his presence, although, when discovered, he cannot be injured wilfully, or treated with a reckless disregard for his safety. *Anternoitz* v. *New York, New Haven, & Hartford Railroad*, 193 Mass. 542. Compare *Indianapolis, Peru & Chicago Railway* v. *Pitzer*, 109 Ind. 179.

The plaintiff, however, urges that the demurrer should be overruled and the judgment reversed, because in a few jurisdictions statutes primarily enacted for purposes similar to our own, even if in some instances varying in terms, have been judicially defined as including protection from personal injuries which might be caused to children of tender years who wandered upon the track through the neglect of the corporation to fence. *Keyser* v. *Chicago & Grand Trunk Railway*, 56 Mich. 559. *Isabel* v. *Hannibal & St. Joseph Railroad*, 60 Mo. 475, 484. *Schmidt* v. *Milwaukee & St. Paul Railway*, 23 Wis. 186. *Rosse* v. *St. Paul & Duluth Railway*, 68 Minn. 216. *Chicago, Burlington & Quincy Railway* v. *Grablin*, 38 Neb. 90. See further, *Atchison, Topeka & Santa Fe Railroad* v. *Ressman*, 9 C. C. A. 20; *Hayes* v. *Michigan Central Railroad*, 111 U. S. 228, and *Union Pacific Railroad* v. *McDonald*, 152 U. S. 262. But even in the distinction, the decisions are not harmonious. Some of them are favorably commented upon by Brown, J., in delivering the opinion of a majority of the court in *New York Central & Hudson River Railroad* v. *Price*, 159 Fed. Rep. 330, where a boy six and a half years old ran on to the defendant's unfenced track, receiving injuries from which he died after a period of conscious suffering. The decision turned upon whether our statute required the road to fence against the plaintiff's intestate, and the construction adopted by this court in *Byrnes* v. *Boston & Maine Railroad*, 181 Mass. 322, was followed, and recovery was denied. A child six years old went upon the unfenced track of the defendant, in *Bischof* v. *Illinois Southern Railroad*, 232 Ill. 446; *S. C.* 13 Ann. Cas. 185, and was killed, but after a review by Cartwright, J., of many of the cases, upon which the plaintiff at bar relies, the court held, that under a statute requiring the corporation to erect and maintain a fence sufficient to prevent cattle, horses, sheep, hogs and other stock from getting on the railroad,

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the company was not responsible for the death of the plaintiff's intestate. It also has been decided in other jurisdictions that statutes requiring the corporation to fence against live stock should not be construed as requiring it to fence for the protection of persons, whether infants or adults, and where fencing is held as designed for the benefit of the general public it would seem there is no obligation to provide for the safety of those capable of taking care of themselves, and of realizing the peril of being on a railroad track. *Allen* v. *Boston & Maine Railroad*, 87 Maine, 326. *Russell* v. *Maine Central Railroad*, 100 Maine, 406. *Nolan* v. *New York, New Haven, & Hartford Railroad*, 53 Conn. 461, 473. *Cauley* v. *Pittsburgh, Cincinnati & St. Louis Railway*, 95 Penn. St. 398. *Baltimore & Ohio Southwestern Railway* v. *Bradford*, 20 Ind. App. 348. *Cornwall* v. *Sullivan Railroad*, 28 N. H. 161, 165, 166. *Delphia* v. *Rutland Railroad*, 76 Vt. 84. *Schreiner* v. *Great Northern Railway*, 86 Minn. 245, 247. *Cohoon* v. *Chicago, Burlington & Quincy Railway*, 90 Iowa, 169, 173. *Ditchett* v. *Spuyten-Duyvil & Port Morris Railroad*, 67 N. Y. 425. *Lake Shore & Michigan Southern Railway* v. *Liidtke*, 69 Ohio St. 384. *Carper* v. *Norfolk & Western Railroad*, 23 C. C. A. 669; *Carper* v. *Kimball*, 35 L. R. A. 135.

If the building and maintenance of a "suitable fence" which under certain conditions formerly devolved upon the landowner, meant a structure sufficient to protect his cattle, and to prevent their intrusion upon the location, no adequate reason has been suggested by the plaintiff why a different construction should be adopted when this duty is imposed solely upon the corporation, and the obligation so extended as to include a structure sufficient to protect the landholder, or occupier, or their servants, when on the premises, from inadvertently passing, or falling upon the track. It was so decided in principle in the case of *Byrnes* v. *Boston & Maine Railroad*, 181 Mass. 322, 323, which was followed with approval in *Gerry* v. *New York, New Haven, & Hartford Railroad*, 194 Mass. 35, 38. We are not satisfied that these recent cases, to say nothing of those which preceded them, should be overruled, and a radical departure entered upon from that which has been deemed to be the true application and construction of these statutes. If the agricultural conditions which prevailed when the development of our railroad law began, and for

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some time afterwards, have very largely changed, and the statutory regulations relating to the operation of railroads should be made more rigorous where the population has become increasingly urban and more dense, by imposing additional safeguards by the erection of barriers, or prescribing what shall constitute a lawful fence, for the personal safety of those who may live on estates adjoining, or in proximity to the line, or use the public ways contiguous and parallel to it, the change should come by further legislation.

The plaintiff having failed to allege any breach of duty by the defendant which it owed to his employer, or to him, the first ground of demurrer was well taken, and the second need not be considered.

Judgment affirmed.

COMMONWEALTH *vs.* WILLIAM J. COYNE.

Bristol. October 25, 1910. — November 21, 1910.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Practice, Criminal, Election by Commonwealth, Waiver, Exceptions. *Election. Waiver. Intoxicating Liquors.*

At the trial of a complaint under R. L. c. 100, § 62, charging the defendant in a single count with making an unlawful sale of intoxicating liquor to a minor, if the evidence of the Commonwealth tends to prove two distinct sales on different days, the defendant has the right before opening his defense to require the Commonwealth to elect upon which of the sales it intends to rely for a conviction.

At the trial of a complaint under R. L. c. 100, § 62, charging the defendant in a single count with making an unlawful sale of intoxicating liquor to a minor, if the evidence of the Commonwealth tends to prove two distinct sales on different days, and the defendant before opening his case moves that the Commonwealth be required to elect upon which of the sales it intends to rely for a conviction, and the presiding judge erroneously denies the motion, the defendant by omitting to take an exception to the denial of his motion and proceeding to put in his evidence does not waive the right to renew his motion at the close of all the evidence and before the beginning of the arguments, and his exception to a denial of his motion by the judge at that time will be sustained.

At the trial of a complaint under R. L. c. 100, § 62, charging the defendant in a single count with making an unlawful sale of intoxicating liquor to a minor, if the evidence of the Commonwealth tends to prove two distinct sales on different days, an error of the presiding judge, in denying a motion of the defendant that the Commonwealth be required to elect upon which of the sales it intends to rely for a conviction, is not cured, after the counsel for the defendant has been

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obliged to argue that there was no sale on either of the two days, by a voluntary concession of the district attorney in his closing argument that he will ask for a conviction only upon proving a sale on a certain one of the two days and by an instruction to the jury that by reason of this concession the jury can convict the defendant only of the single offense relied upon, because the defendant already has suffered the disadvantage of his counsel being obliged to argue that there was no sale on either of the two days.

COMPLAINT, received and sworn to in the Second District Court of Bristol on March 9, 1908, under R. L. c. 100, § 62, charging, in a single count, that the defendant at Fall River on February 15, 1908, "did then and there sell intoxicating liquor, to one William P. Wetherell, he the said Wetherell being then and there a minor, under the age of twenty-one years, the said Coyne not having then and there any license, authority or appointment according to law, to make such sale."

In the Superior Court the defendant was tried before *Raymond*, J. There was evidence tending to show a sale of liquor by the defendant to the minor, when he was in the company of certain persons, on Tuesday February 11, 1908. There also was evidence tending to show another sale of liquor by the defendant to the minor, when he was in the company of different persons, on the Friday afternoon following the Tuesday named.

At the close of the evidence of the Commonwealth the defendant asked the judge to compel the Commonwealth to elect upon which offense, the one on Tuesday or the one on Friday, it would rely, but the judge refused to compel the Commonwealth to elect. The defendant then testified in his own behalf and denied that he ever sold liquor to the alleged minor or to any of the witnesses. At the close of all the evidence the defendant again asked the judge to compel the Commonwealth to elect upon which offense it would rely, but the judge refused to compel the election, and the defendant excepted. The defendant's counsel then proceeded with his argument and discussed the evidence bearing upon the alleged sale to the minor on Tuesday and the alleged sale on Friday, and said that he understood that the judge would allow them to convict the defendant if they found that either sale was made. The district attorney, in closing for the Commonwealth and after he had made a statement of the law with reference to illegal sales, said that the law would cover a sale such as was alleged on Tuesday or Friday, but that

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under this complaint he would ask them to convict only for the offense on Tuesday, and that, unless they found the sale to have been made on Tuesday, they should find a verdict of not guilty. The judge in his charge said that, the district attorney having chosen to tell the jury that he would ask for a conviction only for the alleged offense on Tuesday, the jury could convict only for that offense.

The questions as to the precise language of the instructions of the judge and whether the defendant properly took an exception to a certain part of the instructions have been made immaterial by the decision of this court.

The jury returned a verdict of guilty; and the defendant alleged exceptions, which were disallowed by the judge and afterwards were presented to this court upon the report of a commissioner.

C. R. Cummings, (*J. Little* with him,) for the defendant.

J. M. Swift, District Attorney, for the Commonwealth.

BRALEY, J. The question for decision is, whether, the defendant having been charged in a single count with a sale of intoxicating liquor to a minor in violation of R. L. c. 100, § 62, had the right where the evidence for the prosecution tended to prove two distinct sales on different days, but all within six years from the date of the complaint, to require the government to elect upon which one of the two it intended to rely for a conviction. If counts for each sale had been joined, the defendant would have had ample notice of the charges, which could be distinctly identified by the record, and, while the trial judge upon his motion might have ordered an election, the denial of the request, being purely discretionary, would not have been ground of exception. *Commonwealth* v. *Sullivan*, 104 Mass. 552. *Commonwealth* v. *Bennett*, 118 Mass. 443. *Commonwealth* v. *Pratt*, 137 Mass. 98.

But at the close of the government's evidence, while the defendant had been set to the bar to face a single issue, two distinct offenses had been put in evidence, to either one of which the averments of the complaint were applicable. By the common law as well as under the Constitution of the Commonwealth, the defendant could not be convicted of both without a violation of the right guaranteed to him, that, when charged with the com-

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mission of crime, "every subject shall have a right to produce all proofs that may be favorable to him" on the issue of his guilt or innocence as set forth in the indictment or complaint. *Commonwealth* v. *Blood*, 4 Gray, 31, 32. *Commonwealth* v. *Dean*, 109 Mass. 349, 352. *O'Connell* v. *The Queen*, 11 Cl. & F. 155, 241. *Commonwealth* v. *King*, 202 Mass. 379, 389.

There is no presumption, that the defendant ought to have anticipated that the scope of the testimony to be used against him would not correspond with the essential allegations of the complaint, and that he must expect to be tried for two offenses, although the averment of time, while necessary, need not be proved as laid. *Commonwealth* v. *Dillane*, 11 Gray, 67. The great embarrassment, however, to which he would be subjected in the preparation and presentation of his defense if under the charge of a single crime any number of similar yet distinct crimes may be proved until perhaps there finally might be one of the number sufficiently satisfactory to the jury, is not the only grave objection.

It is forcibly pointed out in *State* v. *Chisnell*, 36 W. Va. 659, that where in the unlawful sale of intoxicating liquors two distinct misdemeanors are proved, while only a single sale is charged, some of the jury may be satisfied of the defendant's guilt as to one sale, while other jurors are convinced only as to the second sale, but all finally concur in a verdict of guilty because taken together they are convinced that the defendant has violated the law. It is also manifest, that the wrong which may be done does not end with the verdict and judgment. If again prosecuted, there being no means of identification of the actual offense upon which the jury returned their verdict, the former conviction would not be a protection from a second conviction. There is no bar unless the offense charged in the first complaint was the same offense for which the defendant is charged in the second complaint. *Commonwealth* v. *Robinson*, 126 Mass. 259, 260, 261. *State* v. *Brown*, 58 Iowa, 298. Wharton, Crim. Ev. (9th ed.) § 104.

The decisions, while recognizing without exception the right to compel an election, are not entirely in accord as to when the defendant must exercise it, but by our practice, and the great weight of authority, he should do so at the close of the gov-

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ernment's evidence, and before being called upon to open his defense. *Commonwealth* v. *O'Connor*, 107 Mass. 219. *Commonwealth* v. *O'Hanlon*, 155 Mass. 198. *Williams* v. *State*, 77 Ala. 53. *Scruggs* v. *State*, 111 Ala. 60. *State* v. *Chisnell*, 36 W. Va. 659. *State* v. *Smith*, 22 Vt. 74. *State* v. *Hurd*, 101 Iowa, 391. *Lebkovitz* v. *State*, 113 Ind. 26. *Goodhue* v. *People*, 94 Ill. 37.

If before introducing his proof the defendant did not except to the denial of his motion to order an election, the right had not been waived, and, the renewal of the request at the close of all the evidence but before the arguments began not having been too late, the refusal to grant it, to which he duly excepted, was erroneous.

Nor was the error cured by the voluntary concession of the district attorney in his closing argument, that he would ask for conviction only on one sale. The right to compel a choice was a personal privilege, not a matter of favor dependent upon the good will or sense of justice of the prosecuting officer, and as the defendant's counsel was put to the disadvantage of arguing a different case from that which was finally left to the jury for decision, the defendant had been prejudiced.

A new trial, therefore, must be ordered, and whether any exception was saved to the instructions becomes unimportant, and need not be determined.

Exceptions sustained.

COMMONWEALTH *vs.* DAVID KUPERSTEIN & others.

Essex. November 1, 1910. — November 21, 1910.

Present: KNOWLTON, C. J., HAMMOND, LORING, SHELDON, & RUGG, JJ.

Receiving Stolen Property. Concealment of Stolen Property.

In order to warrant a conviction under R. L. c. 208, § 51, of the crime of receiving stolen property knowing it to have been stolen, it is not necessary to show that the defendant had physical possession of the articles stolen. It is enough to show that the goods were constructively in the defendant's keeping and that he had such control of them as was equivalent to possession. Thus it is sufficient to show that the defendant, knowing that certain cloth had been stolen and was in the possession of his brother in law in the house in which the defendant lived, sought out a purchaser and brought about a sale of the

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stolen cloth for which he was paid a commission by both the buyer and the seller.

In order to warrant a conviction under R. L. c. 208, § 51, of the crime of aiding in the concealment of stolen property knowing it to have been stolen, it is not necessary to show that there has been an actual hiding of the stolen property. It is sufficient to show that the defendant aided in so disposing of the property that it would be likely to find its way into the ordinary channels of trade and by being commingled with general merchandise lose its marks of identity.

INDICTMENT, found and returned in the Superior Court in the county of Essex on September 12, 1910, under R. L. c. 208, § 51, against David Kuperstein, David Rosenberg, Sarah Rosenberg, and four others, charging them with buying, receiving and aiding in the concealment of certain stolen cloth belonging to the Arlington Mills, a corporation doing business in Lawrence, knowing it to have been stolen.

In the Superior Court the case was tried before *Schofield*, J. The facts which it was agreed were shown by the evidence are stated in the opinion. The defendant Kuperstein asked the judge to rule that on these facts he could not be convicted. The judge refused to make this ruling, and submitted the case to the jury, who found Kuperstein, as well as the other defendants, guilty. The defendant Kuperstein alleged exceptions.

The case was submitted on briefs.

L. H. Schwartz & M. A. Cregg, for the defendant Kuperstein.

H. C. Attwill, Assistant District Attorney, for the Commonwealth.

RUGG, J. The defendant was tried upon an indictment which charged him and others with buying, receiving and aiding in the concealment of stolen cloth. The evidence consisted of agreed facts in substance to the effect the defendant, knowing that the cloth had been stolen and was in the possession of his brother in law, one Rosenberg, in the house where the defendant lived, sought out one Marshall, and offered for a commission to send to him a man who had some stolen cloth to sell. Marshall, who in fact was investigating the thefts, said, "Send the man to me and I will buy the cloth and pay you two and one half cents commission on each yard." Subsequently Rosenberg brought the cloth to Marshall and sold it to him, and the defendant received a commission from both Marshall and Rosenberg. The only question presented is whether the defendant's request that

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a verdict be directed in his favor was properly refused. The natural inferences from the agreed circumstances might well convince the ordinary mind beyond a reasonable doubt that the defendant had such control of the goods as was equivalent to possession. It was not necessary to prove that the defendant had a physical and corporal holding of the articles alleged to have been stolen. It was enough if they were constructively in his keeping. It might also have been found that he was assisting in getting the cloth so disposed of that it might find its way into the ordinary channels of trade, and by being commingled with the general merchandise of the country lose its marks of identity as stolen property. This might be effective help in its concealment. In order to constitute the crime of aiding in the concealment of stolen goods, it is not necessary that there be actual hiding, but only such conduct as might render their discovery difficult.

Exceptions overruled.

MARY E. A. DOHERTY *vs.* BOSTON AND NORTHERN STREET RAILWAY COMPANY.

WILLIAM B. DOHERTY *vs.* SAME.

Essex. November 3, 1910. — November 21, 1910.

Present: KNOWLTON, C. J., HAMMOND, LORING, SHELDON, & RUGG, JJ.

Negligence. Street Railway. Joint Tortfeasors.

In an action against a street railway corporation for personal injuries sustained while the plaintiff was being transported as a passenger in an open electric car of the defendant, there was evidence, that the car came in collision with a horse and wagon at the junction of two intersecting streets, that the car could not be seen by travellers on the intersecting street nor could the motorman of the car see such travellers until the car nearly had reached the corner, that the collision occurred about twenty-five feet from the point where the motorman first came in sight of the wagon, that the rate of speed of the car was seven or eight miles an hour, that two persons who were in the wagon heard no bell or gong sounded, that the force of the collision threw the horse to the ground, and that the plaintiff, while either rising or turning in her seat to signal to the conductor, was thrown by the jolt of the collision against the edge of the seat and was injured. It further appeared that the collision took place in broad daylight on an unobstructed street. *Held*, that there was evidence of negligence on the part of the defendant toward the plaintiff as a passenger.

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If a person, while being transported as a passenger on a car of a street railway corporation, is injured by reason of a collision of the car with a horse and wagon, which was caused by the concurrent negligence of the motorman of the car and of the driver of the wagon, the railway corporation operating the car is liable to the passenger for his injuries.

TWO ACTIONS OF TORT, the first action by a married woman for personal injuries sustained on July 28, 1908, at a little after 11.25 A. M., while the plaintiff was being transported as a passenger on an open electric car of the defendant, by reason of a collision of the car with a horse and wagon at the intersection of Flint Street with Boston Street in Lynn, as the car was going along Boston Street on the single track at the side of that street about four or five feet from the sidewalk; and the second action by the husband of the plaintiff in the first action for loss suffered in consequence of her injuries. Writs dated November 4, 1908.

In the Superior Court the cases were tried together before *Stevens*, J. The essential facts which could have been found upon the evidence are stated in the opinion. At the close of the evidence the defendant asked the judge to rule (1) that upon all the evidence the plaintiffs were not entitled to recover and (2) that there was no evidence of negligence on the part of the defendant, its servants, agents or employees. The judge refused to make either of these rulings, and submitted the case to the jury under instructions to which no exception was taken.

The jury returned a verdict for the plaintiff in the first case in the sum of $1,200 and a verdict for the plaintiff in the second case in the sum of $225. The defendant alleged exceptions.

S. Parsons, (*H. A. Bowen* with him,) for the defendant.

R. L. Sisk, (*J. H. Sisk* with him,) for the plaintiffs.

RUGG, J. The female plaintiff (hereafter referred to as the plaintiff) seeks to recover for personal injuries received, while a passenger in one of the defendant's cars, by reason of its collision at the junction of two streets with a horse-drawn covered wagon. The track of the defendant was on the side of the street. View of the car by travellers upon the intersecting street, as well as the vision of the motorman of travellers upon that street, was obstructed until the car had nearly reached the corner of the streets. There was evidence that the speed of the car was seven or eight miles an hour, and that the collision occurred about

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twenty-five feet from the point where the motorman first came in sight of the wagon. Three persons were riding in the wagon, two of whom testified that they did not hear any gong or bell. Their situation was such as to make these statements some evidence that the bell or gong was not sounded. *Slattery* v. *New York, New Haven, & Hartford Railroad*, 203 Mass. 453. There was evidence that the plaintiff, while either rising or turning in her seat to signal the conductor, was thrown by the jolt of the collision against the edge of the seat and injured.

This is not a case where the only evidence as to the jar complained of as the cause of the injury consisted of declamatory epithets, as in *Foley* v. *Boston & Maine Railroad*, 193 Mass. 332, 335. Here was the definite physical fact of a collision between a car and a horse of such force as to throw the latter to the ground, followed by the stopping of the car. From these circumstances the jury might draw inferences as to the probable effect upon passengers inside the car. Nor is this a case where there is an unexplained shock of a moving car like *Timms* v. *Old Colony Street Railway*, 183 Mass. 193, or a usual motion of a well managed car on a good track as in *Byron* v. *Lynn & Boston Railroad*, 177 Mass. 303. The plaintiff offered evidence of an uncommon movement of the car due to an extraordinary cause. If there was evidence that this cause was attributable to negligence in the operation of the car, she was entitled to go to the jury. *McGann* v. *Boston Elevated Railway*, 199 Mass. 446.

The defendant was bound to use toward the plaintiff as its passenger the highest degree of care consistent with the reasonable performance of its duty as a common carrier. Toward other travellers upon the highway it was required to exercise only the ordinary care of a prudent person. It is the general rule, in actions for injuries caused by a collision between an electric car and a wagon at intersecting streets, to leave the question of the negligence of the motorman to the determination of the jury. *Halloran* v. *Worcester Consolidated Street Railway*, 192 Mass. 104. *Eustis* v. *Boston Elevated Railway*, 206 Mass. 143, and cases cited. *Evensen* v. *Lexington & Boston Street Railway*, 187 Mass. 77. Where the burden resting upon the present plaintiff was only to introduce evidence from which a failure might be inferred, to use the high degree of care in avoiding collision, to

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which she was entitled as a passenger, the reason is stronger for submitting that question to the decision of a jury than in the case of a collision between two travellers having equal rights and subject to the same obligations upon the way. The omission by the motorman to give any warning of the approach of the car, coupled with the fact of the collision in broad daylight on an unobstructed street, was enough to support a finding of failure of the duty owed to the plaintiff. Even if the injury of the plaintiff resulted from the concurrent negligence of the driver of the wagon and of the motorman, she might recover against the defendant. *Corey* v. *Havener*, 182 Mass. 250.

Exceptions overruled.

IDA C. HUNT *vs.* RHODES BROTHERS COMPANY.
JOSEPH S. HUNT *vs.* SAME.

Suffolk. November 14, 1910. — November 21, 1910.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Agency. Husband and Wife. Negligence, Of marketman.

In an action by a married woman against the proprietor of a market, for personal injuries received by the plaintiff from a double-pointed barbed tack, which had fastened a tag to a leg of lamb and which the defendant's servant negligently suffered to remain embedded in the leg of lamb when the tag was removed, the plaintiff testified that she was going to give a dinner party, that she gave her husband $2 and sent him for a leg of lamb, that he brought one home, and that while she was preparing it to be served at the dinner party she received the injuries from the embedded tack. The plaintiff's husband testified that he was sent by his wife for the leg of lamb, that she gave him the money with which to pay for it, that he told the defendant's salesman that his wife wanted a nice leg of lamb and that the salesman got it for him and he paid for it with the money that his wife gave him. There was evidence that the plaintiff and her husband kept house together, that he supported the plaintiff and their child and properly provided for them at all times, and that he never had suffered them to lack for any of the necessaries of life or for anything that was proper. After a verdict for the plaintiff, a bill of exceptions alleged by the defendant stated that the only question raised was whether there was sufficient evidence that the plaintiff's husband was acting as her agent to sustain the verdict. *Held*, that this court could not say that there was no evidence warranting a finding that the husband was acting as the agent of his wife, and therefore the defendant's exceptions were overruled, although *it was said* that, if it had been open upon the bill of exceptions, the verdict could have been sustained more satisfactorily on the ground of the duty of the defendant in selling the leg

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of lamb for food to see that nothing was suffered to remain embedded in it which would be likely to cause injury to a person preparing it to be used for food in the exercise of reasonable care.

MORTON, J. These two actions of tort were tried together * and a verdict was rendered for each plaintiff. The cases are here on the defendant's exceptions. We shall speak of the female plaintiff as the plaintiff. She was injured by a barbed tack embedded in a leg of lamb which she was preparing for cooking, and which her husband was alleged to have purchased from the defendant as her agent. It is admitted that the plaintiff was in the exercise of due care and that there was evidence of negligence on the part of the defendant's servant. The exceptions state that the only question is whether there was sufficient evidence that the husband was the agent of the plaintiff to sustain the verdict in her favor.

The relation of husband and wife and the obligation which the husband was under to support his wife did not as matter of law render either incompetent to act as the agent of the other or prevent the wife from giving a dinner party on her own account any more than from buying stock on her own separate and individual account if she saw fit to do so. Whether the husband was acting for the plaintiff in the purchase of the leg of lamb or was buying it for family use, and whether in giving the dinner party the plaintiff was acting on her own account were questions of fact to be determined by the jury under suitable instructions. The husband testified that he was sent by his wife for the leg of lamb; that she gave him the money with which to pay for it; and that he told the salesman that his wife wanted a nice leg of lamb and the salesman got it for him and he paid for it with the money that his wife gave him. The wife testified that she was going to give a dinner party and gave her husband $2 and sent him for a leg of lamb and he brought one home and she looked it over and put it in the ice chest and while preparing it to be served at the dinner party to be given by her received the injuries complained of, which, it appeared, were caused by a double-pointed carpet tack barbed at both ends with which the tag had been fastened to the lamb and which was suffered to remain embedded in the leg of lamb when the

* Before *DeCourcy*, J.

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tag was removed. This was all of the testimony bearing on the question of agency except testimony to the effect that the plaintiff and her husband kept house together and that he supported his wife and child and had supported and properly provided for them at all times and had never suffered them to lack for any of the necessaries of life or for anything that was proper.

The question is not one of the weight of evidence but whether there was any evidence tending to show that the husband was acting as agent for the wife. While the circumstances are somewhat unusual and it is possible that the dinner party spoken of differed from the ordinary family dinner only in being more elaborate and in the fact that guests were to be invited, it cannot be said, we think, that there was no evidence warranting a finding that the husband was acting as agent for the wife.

We cannot help feeling that a more satisfactory ground on which to rest the case would have been the duty which the defendant owed to any one preparing it to be served as food to see that there was not suffered to remain embedded in the lamb anything that was liable to cause injury to any one in preparing it while in the exercise of due care. But we must deal with the case as it is presented.

Exceptions overruled.

C. S. Knowles, for the defendant.

J. P. Magenis & John Wentworth, for the plaintiffs, were not called upon.

COMMONWEALTH *vs.* WALTER ALTHAUSE.

Suffolk. March 17, 1910. — November 22, 1910.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Pledge. Contract, Construction. *Practice, Criminal*, Exceptions, Bill of particulars. *Larceny. False Pretenses. Evidence*, To show intent. *Words*, "Use."

An agreement, contained in a note secured by a pledge of negotiable securities, in regard to the power of the pledgee to dispose of the securities before default, is not to be construed to give the pledgee the right to sell the securities and thus to

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end the pledge and all the rights of the pledgor in the securities, unless the language to this effect is unequivocal.

A note secured by a pledge of negotiable securities contained the following provision: "It is hereby agreed that the lenders or assigns shall have the right to make such use of the collateral security named herein . . . as they may desire, subject only to their obligation to deliver to the said borrower, or order, collateral of the same amount and kind." *Held*, that the power to make use of the pledged securities was confined to their use as collateral security and gave the pledgee no right to sell them before default. Distinguishing *Ogden* v. *Lathrop*, 65 N. Y. 158.

The defendant in a criminal case has no right of exception to an erroneous instruction of the presiding judge stating a view of the case which the defendant asked the judge to adopt.

At the trial of an indictment for larceny, where a bill of particulars filed by the Commonwealth at the request of the defendant sets forth the facts relied upon by the Commonwealth without any color being added to them by way of a conclusion of law, the Commonwealth is at liberty to make out larceny in any way in which the facts stated show that a larceny was committed, whether it was a larceny at common law, or by embezzlement, or by obtaining property by false pretenses, or under the definition contained in R. L. c. 208, § 26.

The defendant in a criminal case cannot complain of an erroneous instruction of the presiding judge, although it resulted in a mistrial, if the defendant did not object to the instruction at the trial.

The crime of larceny by obtaining property by false pretenses as distinguished from larceny at common law consists in obtaining by a false pretense the title to property and not its mere possession, so that to make out a case of obtaining property by a false pretense it must be shown either that the title was so obtained or that a contract was procured by a false pretense under which the owner of the property passed the title to another.

If the holder of a note secured by a pledge of negotiable securities, which an agreement contained in the note gave him the right to pledge but not the right to sell before default, obtained the pledge and the agreement by means of a false pretense, and afterwards contrary to the terms of the agreement wrongfully sold the pledged property before default, although this is larceny at common law and also is larceny as defined by R. L. c. 208, § 26, it is not larceny through obtaining property by a false pretense.

The fraud of obtaining property by buying it intending not to pay for it is not under the statutes of this Commonwealth the crime of obtaining property by a false pretense which is included in larceny.

At the trial of an indictment for larceny, if there is evidence that the defendant, who had taken certain negotiable securities as a pledge to secure a note which contained an agreement giving the pledgee the right to pledge but not the right to sell before default the securities held as collateral, wrongfully sold the pledged property before default the day after he received it, and if the defendant contends that in selling the pledged securities he acted honestly believing that he had a right to sell them by the terms of the agreement contained in the note, the Commonwealth may show that at the time the pledge was made the defendant represented to the pledgor that the pledged securities would be pledged by the defendant to a certain bank from which they could be procured by the substitution of other collateral on one or two days' notice of intended

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payment of the note, this representation by the defendant of his intention as to dealing with the securities, which he sold the next day, being material to show criminal intent on his part.

INDICTMENT, found and returned in the Superior Court for the county of Suffolk on August 7, 1909, charging that "Walter Althause on the fourth day of February in the year of our Lord one thousand nine hundred and nine did steal one negotiable receipt of the value of two thousand dollars, one piece of paper of the value of two thousand dollars, of the property of one Charles A. Powers."

The defendant asked for a bill of particulars, which accordingly was filed by the Commonwealth, and was as follows:

"Now comes the Commonwealth in the above entitled action and in compliance with the defendant's motion therefor files the following bill of particulars:

"On or about the third day of February, 1909, the defendant told one Charles A. Powers that he would loan the said Powers the sum of five hundred dollars ($500) for three (3) months at six (6) per cent interest and take from the said Powers, as collateral security for the payment of such loan, a negotiable receipt of one C. H. Venner for two (2) six (6) per cent. bonds of the Urbana Water Works Company, and the defendant falsely and fraudulently represented to the said Powers that the defendant intended either to keep the said certificate in his possession or to place the same as collateral security with some bank or banking company for a loan to be made by such bank or banking company to the defendant or to the firm or person by whom the defendant was employed. Thereupon, upon the same date, the said Althause loaned to the said Powers the sum of five hundred dollars ($500) and received a note for the said amount, dated February 3, 1909, for three (3) months, at the rate of six (6) per cent. per annum, signed by Charles A. Powers, and the defendant also received as collateral security for the payment of the liability evidenced by said note the said receipt of said C. H. Venner. On or about the third or fourth day of February, 1909, the said Althause sold and delivered the said receipt through the office of Wesley A. Gove & Co., and has never since held any control over the said receipt or retained any title or interest in the said receipt, but parted with title thereto absolutely. There-

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after, and after the maturity of the said note, the said Powers made repeated demands upon the said Althause for the return of the said receipt or of a receipt similar in kind and amount to the said receipt, and has made tender of the amount of the note due from the said Powers to the said Althause with interest at six (6) per cent. from the date of the making of the said note, but the said Althause has declined and refused to deliver to the said Powers the said receipt or any receipt of the same amount and kind as the said receipt.

"The said defendant never intended to retain possession of the said receipt or to place the said receipt in any loan to be made to him by a bank or banking company, but at the time of making the aforesaid representation to the said Powers, and at the time of receiving the said receipt from the said Powers, and at the time of the defendant's selling the same, he intended to dispose of the same and to divest himself of all title to the said receipt, and any lien thereon that the said defendant might have."

In the Superior Court the case was tried before *Wait*, J.

Charles A. Powers testified that in February, 1909, he had some dealings with the defendant with reference to a loan in the office of one Adams in the Exchange Building in Boston. He testified as follows: "The very last day of January I went to the office of Mr. Adams and there met Mr. Althause. I asked for Mr. Adams. Mr. Althause replied that Mr. Adams was not in but that perhaps he would do any business that I wanted done for me, as he was authorized to do business. I told him that I wished to obtain a loan of $600, giving as security therefor a receipt for two bonds of the Urbana Water Works of the denomination of $1,000 each. I think he asked me what the bonds were, and I explained to him; and he asked me where he could find out what they were worth, and if they were active. I told him that if he would call up Brown Brothers, bankers, they would be able to tell him the worth of the bonds, or what the quotation was. I then explained to him that the market value of the bonds was far in excess of what they were being quoted at at that time. They were quoted around fifty, making the two thousand dollars worth about a thousand dollars, according to the quotation. Mr. Althause turned to a second gentleman who

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was there, and asked him to call up Brown Brothers on the telephone, which he proceeded to do. In two or three minutes, or perhaps less, he said to me that he could not find out the value then, but that if I would come in again that he would let me know. That was, I think, all that transpired at that interview. I went in, perhaps the next day or the second day after; I can't say which. I saw Mr. Althause then, and he said that he had not found out, and to come in again. I went in again the following morning. I saw Mr. Althause, and he said that he would loan me $500 on the bonds, or on the receipt for the bonds. I asked him if he would not let me have the whole $600, and he said, no, he would not. I asked him if he did not consider the collateral good for it. He said, yes, it was good for it, but he would not let me have it. I told him that I would take the $500. Q. At that time was it at this interview at which you gave your note? A. No, sir. — Q. Was that the end of that interview? A. No, sir. — Q. Was there further conversation between you and Mr. Althause at that interview? A. There was further conversation at that time. — Q. Will you tell us what that conversation was? A. He asked me for how long a time I wanted the loan, and I told him sixty days or thirty days, either one; and he said that he would not consider the matter for either thirty or sixty, nothing less than three months, because the interest on it would not pay him to bother with it; and I told him that I would take the loan for three months. I also told him that the receipt for the bonds was in Worcester and I would have it come down to the National Shawmut Bank the next day with the draft attached, and asked him if he would go down there with me and take it up, and he said that he would, and I made an appointment to come in the following morning about ten o'clock and see him. He said, "Inquire for me when you come in," and I then asked him his name. Up to that time I did not know the gentleman's name. He told me it was Mr. Althause. I went in the following morning and went with him into a little private office, and he sat down at a desk, took out a blank form of note, handed one to me, and he went to filling out another. While he was filling this out I read the form of the note which he handed to me."

The witness testified that at that interview he signed a note

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which was produced and introduced in evidence, and was as follows:

"$500. Boston, February 8, 1909.

"Three months after date, for value received, I promise to pay to myself or order five hundred dollars, with interest at the rate of 6 per cent. per annum, having deposited as collateral security for payment of this or any other direct or indirect liability or liabilities of ours [mine], due or to become due or that may hereafter be contracted, the following property: $2,000 bonds Urbana Water Works (receipts), with authority to sell and transfer the same, or any collaterals substituted for or added to the above without notice, either at public or private sale or otherwise, at the option of the holder of this obligation on the non-performance of this promise. Said holder applying the net proceeds to the payment of this note, and accounting to me for the surplus, if any; and it is hereby agreed that the lenders or assigns shall have the right to make such use of the collateral security named herein together with any collateral added to or substituted for the same and dividends declared, if any, as they may desire, subject only to their obligation to deliver to the said borrower, or order, collateral of the same amount and kind as that mentioned above, together with any collateral added to or substituted for the same with the amount of dividends, if any, collected during the term of this note upon payment of this obligation at maturity. Should the market value of any security pledged for this loan, in the judgment of the holder or holders hereof, decline, I hereby agree to deposit forthwith on demand (which may be made by a notice sent by mail, or otherwise, to my residence or place of business) additional collateral, so that the market value of the security pledged herewith shall always be at least 20 per cent. more than the amount of this obligation, and failing to deposit forthwith such additional collateral or to keep said 20 per cent. margin good at all times, this note shall be deemed to be due and payable forthwith anything hereinbefore expressed to the contrary notwithstanding, and the holder or holders may immediately sell at public, or private sale, the collateral then held for payment of this or any other liabilities above mentioned and apply the net proceeds, after deducting the

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costs and expenses, to pay this, either or any of said liabilities, as said holder may deem proper, and we (I) hereby agree to pay any deficit which may arise because of any loss in the sale of the collateral mentioned herein. Payable at any bank or trust company in Boston.

"Charles A. Powers.

"Notify at 176 Federal street, Room 317.

"Indorse here: Charles A. Powers."

The witness further testified: "Q. At the time you signed that note in this little private office, did you have any conversation with Mr. Althause with reference to any terms or with reference to what use or disposition should be made of the collateral? A. I did." To the admission of this evidence the defendant objected on the ground that it tended to vary or control the terms of the written agreement contained in the note, but the judge admitted the evidence and the defendant excepted. The witness thereupon testified, subject to the defendant's objection and exception, as follows: "Q. Now, if you will go ahead, Mr. Powers, and tell us what conversation you had at the time that this note was given. A. As soon as I had read the form of the note through and Mr. Althause had finished writing in what he wrote, I asked him why he inserted the clause giving them the right to the use of the collateral. I cannot repeat that clause." On being shown the clause, "shall have the right to make use of such collateral named herein," the witness said, "That was the clause." "Mr. Althause said that they had applications for loans greater by far than they had the money personally to supply, and that under that note they collected several minor loans which they had made to their customers into one group. He said that they had collected a number of minor loans which they made to their customers into a group, and they themselves, on this group of loans, obtained a loan from the bank. I asked him what bank they used, or which bank they used, and he said there were several banks. He said, 'We are just now getting a collection of loans to go up to a bank in Haverhill, and your security will be put in that set and go there.' I said, 'Is there any doubt in regard to the security of the collateral?' He said, 'None whatever. We

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have a special arrangement with the banks with which we do business whereby we can substitute collateral so that when a man pays his obligation to us, if he will just give us one or two days' time, we will get the collateral for him."

The witness was asked, "Q. I will ask you this question, Mr. Powers. I will ask you whether or not any representations made to you by Mr. Althause in regard to the disposition of the collateral or what would be done with it influenced you in any way in regard to the signing of that note?" To the admission of this evidence the defendant objected. The judge admitted the evidence and the defendant excepted. Witness answered, "They did."

The witness proceeded to testify, subject to the objection and exception of the defendant, as follows: "Q. I will ask you what representations of Mr. Althause influenced you in signing that note? A. The representations that the collateral which I was giving him would be security to me. — Q. Would be security to you? A. Yes. — Q. I ask you if any of the other conversations which you had with regard to this security influenced you? A. All of his statements which tended to show me that my collateral would be secure influenced me."

The witness further testified, "I met Mr. Adams at the National Shawmut Bank by appointment on the same day, either the third or fourth of February. I think on the date of the note. A gentleman was present whom I have since found out was Mr. Barnum. He is here to-day. I obtained my $500 at that time."

The following testimony then was introduced subject to the defendant's exception: "Q. Now, will you tell us all the circumstances of obtaining that $500 and also any conversation had in the presence of Mr. Althause? A. I asked the clerk of the bank to let me see the receipt for examination. He handed it to me. I handed it to — Q. The receipt? A. The receipt for the bonds. — Q. The receipt for the two bonds? A. Yes, sir. I took the receipt and handed it to Mr. Althause, who in turn handed it to Mr. Barnum. Mr. Barnum looked it over and said, 'That is all right'; and Mr. Barnum handed to Mr. Althause $500. — Q. In cash? A. Cash, bills; and Mr. Althause handed the $500 to me. — Q. And Mr. Althause had previously

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received the note? A. Mr. Althause had received the note in his office, or Mr. Adams's office, as stated. — Q. And what did you do with the receipt for the two bonds — the Urbana Water Works bonds? A. I handed that to Mr. Althause. Mr. Althause handed it to Mr. Barnum prior to my receiving the $500. — Q. So that the last you saw of it Mr. Barnum had it? A. Yes, sir. — Q. Was there any other conversation that took place at that interview? A. Yes, sir. — Q. You may go ahead. A. As we were going out of the bank I said to Mr. Althause, 'The value of those bonds is far in excess of the figure which is quoted for them. They are an investment of long standing held mainly by banks'; and he said to me, 'In my investigation of their value, I judged that to be the case.'"

The witness further testified, "Early in June I went to Mr. Adams's office and inquired for Mr. Althause. That was some time after three months had run. I didn't find Mr. Althause. The first two or three times I didn't see him. I finally saw him, and I told Mr. Althause that I wanted to pay him the $500 and interest and take up my receipt. He said that that receipt was with other security held by a bank in New York; that they had gotten the loan. That the receipt, together with other collateral, had been deposited as collateral for a note of $7,000 with a bank in New York, and that they had not been able to get the receipt back, but that they thought they would be able to do so in a few days, and that if I would come in within a day or two, they would probably have it. I said I would come for it within a day or two, and did go back. I went several times within a day or two, but didn't find him. I finally found him, and I [he] said that — in reply to a question from me — that he feared that the receipt had been sold by a broker in New York with whom they had put it up as collateral. I asked him if he knew that it had been sold, and he said, no, that he did not, but he thought that it was sold; that they were doing everything in their power to get the receipt, and undoubtedly within a few days would have it for me. I went back. The next time I saw Mr. Adams was on the 7th of July. I took with me one Mr. Baxter, and went in and inquired for Mr. Althause; was shown into his private office, and I there made legal tender of $500 with interest, and asked for my note and my receipt for the bonds. I did not

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get them, and have never got them. I have seen the note since then in the possession of Mr. Althause's attorney, but it has not been in my possession."

It further appeared that the defendant sold the receipt on February 4. The defendant testified that under the form of note which Powers had signed he understood that he had a right to dispose of the bonds.

At the close of the evidence the defendant asked the judge for seventeen instructions to the jury, of which the judge refused to give the first, sixth, seventh, tenth, eleventh and seventeenth, which were as follows:

1. The defendant is entitled to a verdict of "Not guilty."

6. A statement by the defendant that he would or would not use the receipt in a certain manner is not a false pretense within the meaning of the word.

7. A representation as an inducement to the making of a loan that something thereafter was to be or was not to be done is not a false pretense.

10. Powers was bound under the terms of his contract in his note to transfer the receipt to the defendant, and, doing what he was legally bound to do, no legal injury was inflicted, and the defendant is entitled to an acquittal.

11. The act of the defendant in offering to pay the value of the receipt to Powers, when Powers tendered the amount due on the note, must be taken into consideration by the jury in determining Althause's intent to defraud, and unless they are satisfied beyond a reasonable doubt that Althause intended to defraud Powers, he is entitled to an acquittal.

17. If the jury find that any representation was made, if that misrepresentation was an inducement to the making of the contract and not a part of the contract itself, then the defendant is entitled to an acquittal.

The judge, having refused to give any of these instructions, submitted the case to the jury with other instructions, of which those that are material to the points decided are described in the opinion.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

C. W. Rowley, (*L. Marks* with him,) for the defendant.

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C. F. Choate, Jr., by leave of court filed a brief for the defendant.

A. H. Weed, for the Commonwealth, submitted a brief.

LORING, J. The defendant contended that under the note held by him signed by Powers he had the right to sell the property held under it as collateral security at any time if he thought it wise to do so. But the presiding judge instructed the jury that the note did not authorize the holder to sell the collateral until the maker of the note was in default under some one of the promises or conditions stated therein. The difference between the two views lies at the foundation of this case and we take it up in the first instance.

The provision to be construed is in these words: "The right to make such use of the collateral security named herein . . . as they may desire, subject only to their obligation to deliver to the said borrower, or order, collateral of the same amount and kind as that mentioned above."

Were it not for the decision in *Ogden* v. *Lathrop*, 65 N. Y. 158, we should have had no hesitation as to the true construction of this provision. It is doubtless competent for a pledgor and pledgee to agree that securities pledged for the payment of a note (in which the pledgor has the general property and the pledgee a special property or lien for payment of the debt due to him from the pledgor) may be sold by the pledgee and the proceeds used by him (the pledgee) as if he alone had been the owner of the securities, leaving to the pledgor (in whom was the general property in those securities) nothing but the unsecured personal obligation of the pledgee to account to him for the value of the securities at the date of the payment of the note. Such an agreement, if made, is not an incident to a pledge of securities. It is an agreement authorizing the pledgee to end the pledge and all the rights of the pledgor in the securities pledged.

It follows that if it is found in a writing by which securities are pledged it must, to have that effect, be couched in terms which do not admit of doubt, as was the case in the note in question in *Wilson* v. *Hawley*, 158 Mass. 250. For if the provision is found in a writing pledging the securities it should be construed, if that be possible, to be an agreement declaring the terms of the pledge and not an agreement authorizing the pledgee

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to end the pledge and all interest of the pledgor in the securities pledged.

It is plain therefore that the "use" authorized in this note should be construed to be a "use" as collateral security unless the provision so construed would be meaningless. But that is far from the fact. It is a matter of common knowledge that, in lending money, banks and bankers require the pledge *en bloc* of the securities put up as collateral. That means that if a lender of money on security wishes to be able to put himself in funds (in connection with the advances made by him) through a rehypothecation of the securities pledged to him, he must have authority to separate the securities received by him from the debts due to him for which they were respectively pledged. That is a right which he does not have in the absence of an agreement authorizing that to be done. Not only that, but such a use of securities pledged to him as collateral is, in the absence of an agreement authorizing it, a criminal offense. R. L. c. 208, § 71.

Where A borrows of B and pledges to B securities for the repayment of the loan so made, and as part of the agreement authorizes B to pledge those securities *en bloc* with other securities owned by him (B) for money borrowed by him, a use of those securities is authorized which is incidental to the pledge of them and not directly destructive of it. We say not directly destructive of the pledge because it is evident that all the securities pledged *en bloc* might be sold to pay the new debt, and in that way the right of redemption which the original pledgor had might be extinguished.

The provision that the "right to make such use of the collateral security . . . as they may desire" is to be "subject only to their obligation to deliver to the said borrower, or order, collateral of the same amount and kind," does not lead to a different conclusion. The obligation to keep sufficient securities of the same amount and kind on hand in place of the identical securities delivered is one of not uncommon occurrence in the methods of carrying on business which now obtain. Its most common occurrence is in case stocks are carried on margin in a jurisdiction where the stock bought and carried on margin belongs to the customer. See *Richardson* v. *Shaw*, 209 U. S. 365, where the cases are collected.

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Ample reason therefore for the provision here in question is found in authorizing the pledgee of the pledged securities to repledge them *en bloc* (as was done in *Wilson* v. *Hawley*, 158 Mass. 250), and such a "use" is a "use" incidental to a pledge and not destructive of it. For these reasons we should not have hesitated to limit the word "use" in this agreement to "use" as collateral security were it not for the case of *Ogden* v. *Lathrop*, 65 N. Y. 158. It was assumed in the opinion in that case, and assumed without argument so far as that opinion goes, that no force could be given to the clause there in question unless a sale was authorized. The clause there in question gave the pledgee "authority to use, transfer or hypothecate" the securities pledged to him. However it may be with those words we cannot believe that when a pledgor gives to the pledgee authority to "use" securities pledged to him he intends to authorize the pledgee to end his (the pledgor's) property in the securities pledged at his (the pledgee's) will, substituting therefor his (the pledgee's) unsecured obligation to account for whatever may be the value of the securities upon payment of the note by the pledgor. For these reasons we are of opinion that the decision in *Ogden* v. *Lathrop*, 65 N. Y. 158, should not be extended to the clause in the note here in question.

The case of *First National Bank of Chicago* v. *Caperton*, 74 Miss. 857, is not an authority for the construction of the note put forward by the prisoner in the case at bar. Where a right to use is given to a mortgagor and the mortgage is a mortgage of the product of a factory or the contents of a store, it would be hard not to construe a right given to the mortgagor to use the mortgaged property to be a right to sell it. But where the right to use is given not to a mortgagor but to a pledgee and the property to be used by the pledgee consists of securities pledged as collateral for a debt due from the pledgor, it is not possible (in our opinion) to construe a right to use to be a right to sell. The other case relied on, *Estes* v. *First National Bank*, 15 Col. App. 526, is a similar decision by an inferior court of Colorado.

We are of opinion therefore that the judge was right in the construction which he put upon the note here in question.

There is another matter lying at the foundation of the case. In that matter we are of opinion that the judge was wrong.

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The error, however, is an error of which the defendant cannot complain, for he asked the judge to adopt the view which he adopted. We discuss it, however, to arrive at a correct understanding of the case and because, as we decide later on, the case must go back for a new trial. The matter we now refer to is the view taken by the judge of the bill of particulars. The judge ruled that the Commonwealth had set forth in its bill of particulars the crime of larceny by obtaining property by false pretenses, and that having done so it must prove that kind of larceny. But in our opinion the bill of particulars is a colorless narration of facts. By that we mean that the facts set forth in the bill of particulars as the facts relied upon by the Commonwealth are set forth without any color being added to them by way of a conclusion of law. Under this bill of particulars the Commonwealth was at liberty to make out larceny in any way in which the facts stated show that a larceny was committed, whether it be a common larceny, embezzlement, obtaining property by false pretenses, or larceny as defined by R. L. c. 208, § 26. As to the last see *Commonwealth* v. *King*, 202 Mass. 379.

There is a further point on which in our opinion there was a mistrial, but of which again the defendant cannot complain. In this instance he cannot complain of the error because he did not complain of it at the trial. The crime of larceny by obtaining property by a false pretense consists in obtaining title to property by a false pretense. *Commonwealth* v. *Barry*, 124 Mass. 325. In the case at bar the title to the receipt for the two bonds which Powers parted with when he signed the note here in question never passed to the defendant. Not only that, but the note did not give the defendant any power of selling the receipt for the bonds and so of passing the title to another. That is just what the judge told the jury that the note did not do. In the case at bar a special property in the receipt for the two bonds passed to the defendant as pledgee of them to secure payment of the note signed by Powers. And it could have been found that this special property was procured by a false pretense. But that was immaterial. Powers did not lose his general property in and title to the receipt for the bonds by the defendant's exercising his rights as pledgee. The bonds were not sold by the defendant under his right of property in them as pledgee,

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nor were they sold under the special rights given by the note to the holder of it (construing the note as it was in our opinion rightly construed by the presiding judge). To make out a case of obtaining property by a false pretense the title must be obtained by a false pretense or a contract must be procured by a false pretense, under which the other party passes the title to another. In the case at bar the receipt for the bond was sold by the defendant wrongfully without regard to his rights as pledgee.

If the bill of particulars had confined the Commonwealth to proving a larceny through obtaining property by a false pretense, the defendant would have been entitled to a verdict of not guilty as matter of law under the construction of the note adopted by the judge. The only effect which the false pretense had (if there was a false pretense in the case at bar) was upon the possession of the receipt which passed to the defendant by the making of the note. At common law that would have been material because obtaining possession by fraud is a taking within the meaning of that word in the definition of larceny at common law. *Commonwealth* v. *Barry*, 124 Mass. 325. *Commonwealth* v. *Rubin*, 165 Mass. 453. *Commonwealth* v. *Flynn*, 167 Mass. 460. *Commonwealth* v. *King*, 202 Mass. 379. But that is no longer material under R. L. c. 208, § 26. Under that act larceny is made out whenever a person "unlawfully and, with intent to steal or embezzle, converts . . . the money or personal chattel of another, whether such money or personal chattel is or is not in his possession at the time of such conversion."

But there is one error made by the judge which is open to the defendant. By his sixth request the defendant asked the judge to rule that "a statement by the defendant that he would or would not use the receipt in a certain manner is not a false pretense within the meaning of the word," and by his seventh request that "a representation as an inducement to the making of a loan that something thereafter was to be or was not to be done is not a false pretense." The testimony which gave rise to these two requests for rulings was given by Powers and was in these words: "As soon as I had read the form of the note through and Mr. Althause had finished writing in what he wrote, I asked him why he inserted the clause giving them the right to the use

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of the collateral. I cannot repeat that clause. On being shown clause, 'shall have the right to make use of such collateral named herein,' the witness said, 'That was the clause.' Mr. Althause said that they had applications for loans greater by far than they had the money personally to supply, and that under that note they collected several minor loans which they had made to their customers into one group. He said that they had collected a number of minor loans which they made to their customers into a group, and they themselves, on this group of loans, obtained a loan from the bank. I asked him what bank they used, or which bank they used, and he said there were several banks. He said, 'We are just now getting a collection of loans to go up to a bank in Haverhill, and your security will be put in that set and go there.' I said, 'Is there any doubt in regard to the security of the collateral?' He said, 'None whatever. We have a special arrangement with the banks with which we do business whereby we can substitute collateral so that when a man pays his obligation to us, if he will just give us one or two days' time, we will get the collateral for him.'" The explanation and the only explanation given by the judge of the difference between a defendant's promise to do a thing in the future and a present intention of a defendant as to the doing of a thing in the future was in these words: "A representation or assurance in regard to a future transaction in the nature of a promise is not a false pretense; that is to say, if I say to you, 'Here, you do a certain thing and then I promise you that some time in the future I will do something else,' it is not a false pretense if I fail to do that thing in the future unless that promise was made to induce you to do the particular thing, and I deliberately intended at that moment not to do it and made it for the purpose of inducing you to do something which you had not determined to do and which you would not have done but for that promise." The defendant "duly excepted to those portions of the charge to the jury which were given relating to the matters contained in the . . . sixth [and] seventh . . . requests."

As a general proposition of law apart from statutes making it a crime to obtain property by a false pretense, it would seem that a man's present intention as to a future act is a fact. *Edgington* v. *Fitzmaurice*, 29 Ch. D. 459. *Swift* v. *Rounds*, 19

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R. I. 527. In the first of these two cases (*Edgington* v. *Fitzmaurice*) Bowen, L. J., said, at p. 483: "The state of a man's mind is as much a fact as the state of his digestion." And Chapman, C. J., in *Commonwealth* v. *Walker*, 108 Mass. 309, 312, said: "A man's intention is a matter of fact, and may be proved as such."

There are cases where this proposition has been applied in case of indictments for obtaining property by a false pretense. For example it was so applied in *State* v. *Nichols*, Houst. Cr. Cas. 114. In that case the defendant, to induce the prosecuting witness to lend him money, represented to him that he wanted it to lend with some of his own money to a third person. The jury were told that if this was false it was a false pretense. The doctrine of this and similar decisions is that if in addition to making a promise to repay money borrowed, for example, the defendant procured the loan by a false statement of his present intention as to the purpose for which he wished to secure the loan, it is a false representation of a fact and so a false pretense. There is however a conflict in the authorities on this point. There are cases in which it has been held that in such a case as that before the court in *State* v. *Nichols*, *ubi supra*, the representation by the defendant of his present intention as to the purpose for which he wished to secure the loan is essentially a promise by the defendant that he will use the money lent in the way then stated and is not a false pretense. See for example *People* v. *Blanchard*, 90 N. Y. 314. The cases on one side and on the other are collected in 19 Cyc. 397, notes 57, 58.

But in the case at bar the presiding judge went beyond any decided case in the explanation which he gave of the difference between the representation of a person's present intention as to a future act and an assurance or promise that the future act shall be done. For the purpose of illustrating the essential difference between the two he put as an example of obtaining property by a false pretense a case which is not obtaining property by a false pretense. In effect he told the jury that if A buys property intending not to pay for it he obtains that property by a false pretense. In that case A makes no representation at all. All that he does is to make a promise, and a promise is not a representation of a fact. It has been sought to make out that in legal

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contemplation a promise with an intention not to perform is a false pretense because a promise to do a thing of necessity implies a present intention to do it, and therefore whenever you have a promise coupled with an intent not to perform you have an implied false representation of an intention to do the act which the defendant promised to do and so a false pretense. And this finds some apparent support in *Swift* v. *Rounds*, 19 R. I. 527. In that case it was held that where a defendant buys property intending not to pay for it he is liable in an action of deceit because he impliedly represents that he intends to pay for it by the act of buying. It may be doubted whether the making of a promise implies of necessity in all cases a present intention to perform that promise. Upon that question we do not find it necessary to express an opinion. For however that may be, the fraud of obtaining property by buying it intending not to pay for it is not, as matter of construction of the statute creating it, the crime of obtaining property by a false pretense. At common law obtaining property by a false representation of fact, that is, by a lie, was not a crime. *Commonwealth* v. *Hearsey*, 1 Mass. 137. *Commonwealth* v. *Warren*, 6 Mass. 72. *Commonwealth* v. *Call*, 21 Pick. 515, 520. Obtaining property by false weights or false measures was a gross cheat at common law and punishable criminally as such. By St. 33 Hen. VIII. c. 1, cheating by false tokens was also made a crime. This was the state of the law when St. 30 Geo. II. c. 24, was enacted. That act provided that "all persons who knowingly and designedly, by false pretence or pretences, shall obtain from any person or persons, money, goods, wares or merchandizes, with intent to cheat or defraud any persons of the same" shall be punished, etc. This was enacted in this Commonwealth (in practically the same words) by St. 1815, c. 136. It is evident that the fraud (which by enacting that statute the Legislature intended to make a crime) was obtaining the property of another by a false statement of a fact; and it is equally evident that in enacting it the Legislature did not have in mind the fraud of buying goods not intending to pay for them. Both are frauds but they are not the same fraud. In our opinion it was the former alone which the Legislature had in mind in making it a crime to obtain property by a false pretense.

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The decisions in this Commonwealth so far as they go are not in conflict with this view. *Commonwealth* v. *Drew*, 19 Pick. 179, was a case where a depositor had deposited money in a bank under a fictitious name and finally presented to the bank a check to be cashed after he had drawn out all the money deposited by him and received payment of it. It was held that he could not be convicted under the statute because drawing and presenting the check was not an implied pretense that he had funds in the bank. This conclusion was reached on the ground that "a check, like an order on an individual, is a mere request to pay." But the court added that if a check drawn under those circumstances is passed to a stranger "it would probably be holden to be a false pretense." In *Commonwealth* v. *Eastman*, 1 Cush. 189, three partners were indicted for conspiracy in defrauding persons of their goods of whom they made purchases while they (the defendants) were in failing circumstances. In the opinion in that case it was said, at p. 222, that if the defendants had bought "knowing that they had no funds to pay with," thus appropriating the goods to their own use, in fraud of the sellers, a different case would have been presented from that which was presented to the jury by the charge of the presiding judge. And this court went on to say: "Such a case would show a deceptive contrivance or false pretence. The known inability to pay for the goods would render the act of the party a fraudulent and unlawful one." In determining what effect should be given to this statement it is to be borne in mind that the indictment then before the court was an indictment for conspiracy. And an indictment for conspiracy was an indictment which there was no reason for resorting to if buying property with an intent not to pay for it is obtaining property by a false pretense. See in this connection *People* v. *Wheeler*, 169 N. Y. 487, 494. The cases of *Commonwealth* v. *Walker*, 108 Mass. 309, and *Commonwealth* v. *Drew*, 153 Mass. 588, were indictments under the special statute originally enacted in 1863 (St. 1863, c. 248, § 2) making it a crime to obtain goods with intent to defraud "under false color and pretence of carrying on business, and dealing in the ordinary course of trade."

The fraud of obtaining property of another by buying it with an intent not to pay for it might well be made a crime by the

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Legislature. But it is not the fraud of obtaining property by a false pretense.

We are therefore of opinion that this exception must be sustained.

We have held that the fact in the case at bar (if it was a fact) that Powers was induced to borrow the money and pledge the receipt by the defendant's misrepresentation of an intention on his part to keep it in a bank as collateral for money borrowed by him did not make out a case of obtaining property by a false pretense because Powers was not thereby induced to part with the property in the receipt. We have also held that although that misrepresentation might bear on the question of possession it is immaterial in that connection because possession is not now material in making out larceny under R. L. c. 208, § 26. But it does not follow that that fact (if it is a fact in the case at bar) is of no significance. It is in our opinion significant (if it is a fact), and its true significance lies in its bearing on the defendant's criminal intent. If the defendant in selling the negotiable receipt the day after he received it from Powers acted honestly under a claim of right he was not guilty of larceny. But on the other hand if he lent the money to Powers to secure possession of the negotiable receipt with a view of feloniously converting it to his own use, and then did feloniously convert it to his own use, he was guilty of larceny. Whether one or the other of these two was the fact was an issue on which the defendant's representation as to his then present intention of keeping the receipt in bank so that he would be able to return it to Powers on his paying his loan was material.

The entry must be

Exceptions sustained.

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JOHNSON AND KETTELL COMPANY *vs.* LONGLEY LUNCHEON COMPANY.

Worcester. October 3, 1910. — November 22, 1910.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Bills and Notes, *Bona fide* purchaser. *Corporation*. *Evidence*, Presumptions and burden of proof. *Payment*. *Practice, Civil*, Exceptions, Non-prejudicial error.

Statement by LORING, J., of the rule of law, which applies when a negotiable instrument of a corporation, the payee of which is a creditor of the officer or agent of the corporation who signed the instrument in the corporation's behalf, is used by such officer or agent to pay his individual debt to the payee, the rule being that the transaction on its face is a wrongful appropriation of the corporation's money and is deemed bad until it is shown to be good, so that the rights of the creditor depend upon whether or not the transaction is in fact what it purports to be, and no question of a purchase in good faith can arise; *and also* of the different rule, which applies when the payee of such negotiable instrument of a corporation is the officer or agent who signed it on the corporation's behalf or some third person and, after being indorsed by the payee in blank, the instrument is used by the officer or agent to pay his individual debt, the rule in such case being that the transaction is good unless it is proved to be bad, so that, if the corporation proves that the use of the instrument by its officer or agent was wrongful, the rights of the creditor depend upon whether or not he acted in good faith in receiving the instrument.

At the trial before a judge without a jury of an action against a corporation for the purchase price of certain goods, it appeared that, at a time when both the corporation and its treasurer were debtors of the plaintiff on separate accounts, the treasurer sent to the plaintiff checks of the corporation, signed by him and made out to the plaintiff as payee, with specific directions to apply them in payment of the individual account of the treasurer. No evidence was introduced to show that the use of the checks by the defendant's treasurer was proper, and the defendant, relying on the rule of law that, in the absence of such evidence under the circumstances, the creditor had no right to the checks, contended that the plaintiff should apply the proceeds thereof upon the debt of the corporation. *Held*, that, the checks not having been remitted to the plaintiff generally, but with specific directions for application to the payment of the individual debt of the treasurer, the defendant had no right to insist that they be applied upon its debt to the plaintiff, whatever its rights as to a recovery from the plaintiff of the proceeds of the checks might be.

In an action against a corporation upon an account annexed for goods sold and delivered, the defendant pleaded merely a general denial and payment. At the trial before a judge without a jury it appeared that at one time both the corporation and its treasurer were debtors of the plaintiff on separate accounts and, against the objection and subject to an exception by the plaintiff, the defendant

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was allowed to show that the defendant's treasurer had sent to the plaintiff checks made payable to the plaintiff and signed by the treasurer on behalf of the corporation, with directions that they be applied in payment of the individual account of the treasurer. There was no further evidence as to whether the use of the corporation's funds by the treasurer was proper. The defendant contended that the proceeds of the checks should be applied on the corporation's account with the plaintiff, and not on the treasurer's individual account, but the judge found in substance that the plaintiff was a *bona fide* purchaser of the checks, and therefore that it was not necessary to determine whether or not the corporation authorized the treasurer so to use its funds, and found for the plaintiff without giving the credit the defendant asked for. The defendant excepted. *Held*, that, although the finding and ruling of the judge seemed to be erroneous, the defendant was not harmed thereby, because, there being no declaration in set-off, the finding was on an issue not raised by the pleadings.

LORING, J. The plaintiff corporation at the times here in question carried on the business of a wholesale grocer, and the defendant corporation kept a restaurant. The plaintiff sold groceries to the defendant from the defendant's organization on September 1, 1908, until July 3, 1909. On May 1, 1909, there was a balance due from the defendant to the plaintiff of $157.04. The treasurer of the plaintiff corporation testified that "this amount was paid by check of defendant for $157.04 on June 1, 1909, which check was sent by defendant to pay this specific amount."

Between May 1, 1909, and July 3, 1909, the plaintiff sold and delivered to the defendant groceries of the value of $243.56, and this action was brought to recover that sum for those goods.

It was admitted that the defendant owed the plaintiff this sum for those goods "unless the facts hereinafter set forth constitute a defense."

"The facts hereinafter set forth" are these: Before September 1, 1908, one Longley had kept the restaurant afterwards kept by the defendant corporation and owed the plaintiff $233.04, for groceries sold by it to him. The defendant corporation was formed to succeed and did succeed to Longley's business and "Longley became its treasurer." On September 23, October 23 and October 30, 1908, Longley sent to the plaintiff checks of the defendant corporation for $81.94, $107.16 and $43.94, with directions to apply them on his individual account, and they were so applied. These checks were signed in behalf of the defendant corporation by Longley as treasurer, and were payable to the

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plaintiff corporation. They amounted to $233.04, the sum due from Longley to the plaintiff.

The plaintiff declared on an account annexed and the defendant pleaded a general denial and payment.

At the trial before a judge * sitting without a jury the above facts were agreed to by the parties or testified to by the plaintiff's treasurer. The defendant put in an account (seemingly rendered by the plaintiff in July, 1909), in which the plaintiff stated all sales and payments from the beginning, that is to say, from September 1, 1908, and not merely those which it sought to recover in this action, to wit, those from May 1, 1909, to July 3, 1909. The sales set forth in this account amounted to $1,463.79, and the payments to $1,212.73, making the balance due $251.06. This account did not include the three checks here in question among the payments and did include among the sales one made on July 13, amounting to $7.50, which was not included in the declaration. On this evidence both parties rested.

The defendant asked for twenty-one rulings.† Of these the judge gave the second, third, fifth, eighth, ninth, fourteenth and fifteenth, modified the tenth and eleventh, and refused the first, fourth, sixth, seventh, twelfth, thirteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth and twenty-first; and made the following finding:

"I find that the plaintiff, in receiving these checks and applying the same in payment of Charles S. Longley's individual indebtedness, acted in good faith, and that the plaintiff had no knowledge as to the conditions of affairs between said Charles S. Longley and the defendant. There was no evidence showing or tending to show that said Longley acted wrongfully in sending these checks on his own personal account unless said wrongful conduct is to be implied from the form of checks and the fact of the issuance of, and the delivery of the same, in payment of his individual indebtedness.

"The defendant claims that these checks were improperly ap-

* *Jenney*, J.

† So much of the substance of these requests for rulings as is material to the decision is given in the statement in the opinion on page 55 as to the effect of the rulings by the trial judge.

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plied in payment of said Longley's individual indebtedness, and that it is entitled, under its answer of payment, to have the amount of the same credited to it in this action in part payment for merchandise sold to it on and after the first day of May following the delivery of the checks.

"No evidence was offered except as herein set forth, as to the circumstances attending the drawing of these checks, or as to the financial or other relations of said Longley with the defendant, except that he was its treasurer.

"I find for the plaintiff in the sum of two hundred and forty-three dollars and fifty-six cents ($243.56) with interest from the date of the writ."

The case is here on exceptions taken to the "finding and rulings" and to the "refusal to find and rule."

By adopting the defendant's requests for rulings which he did adopt, the judge in effect ruled that under the circumstances of the present case the plaintiff would have been bound to credit all payments made from the funds of the defendant corporation to the account of the defendant, unless that corporation authorized them to be credited to the treasurer's personal account, had it not been for the question of the plaintiff's being a *bona fide* purchaser for value without notice of the three checks by which these payments were made. And by refusing the requests which he refused, the judge ruled in effect that if the plaintiff was a *bona fide* purchaser for value without notice it was not necessary to come to a decision on the corporation's consent to the money here in question being applied to pay the individual debt of the treasurer. This was followed by his finding that the plaintiff was a *bona fide* purchaser for value without notice of the three checks.

It would seem that the finding made by the judge was an error. The checks in the case at bar being payable directly to the plaintiff would seem to bring the case within *Newburyport* v. *Fidelity Ins. Co.* 197 Mass. 596, *J. G. Brill Co.* v. *Norton & Taunton Street Railway*, 189 Mass. 481, *Freeman's National Bank* v. *Savery*, 127 Mass. 75, and *National Park Bank* v. *German-American Mutual Warehousing & Security Co.* 116 N. Y. 281, and not within *National Bank of Commonwealth* v. *Law*, 127 Mass. 72, *Fillebrown* v. *Hayward*, 190 Mass. 472, and *Feigenspan*

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v. *McDonnell*, 201 Mass. 341. The distinction seems to be this: Where the corporation note or other negotiable instrument is payable to the creditor of the individual, the transaction which on the face of the note or other instrument is represented to have taken place is an appropriation of the corporation's money to the payment of the individual's debts and is bad unless shown to be good. Since the transaction is bad unless shown to be good and since the purchaser took with notice (given on the face of the note or other instrument), his rights depend upon the transaction's being or not being in fact what it purports on the face of the note or instrument to be, and no question of a purchase in good faith can arise. See for example *Wilson* v. *Metropolitan Elevated Railway*, 120 N. Y. 145, 150. But on the other hand where the note or other instrument is payable to the treasurer or to a third person and after being indorsed by the payee in blank is used by the treasurer in paying his individual debt, the transaction which on the face of the instrument is represented to have taken place is a payment by the corporation to the treasurer (where the note or other instrument was payable to him), and a payment by the corporation to the third person and another payment by the third person to the treasurer (where the note or other instrument was payable to a third person as stated above). In each of these last two cases the transaction on its face is good unless it is proved to be bad. In that case, if the corporation proves that the application of the note or other instrument of the corporation was a wrongful one, the rights of the creditor depend upon his having acted in good faith. In this connection compare *Freeman's National Bank* v. *Savery*, 127 Mass. 75, and *National Bank of Commonwealth* v. *Law*, 127 Mass. 72.

If the rights of the parties to this action depended upon the plaintiff's right to retain the money received by it on these checks, we should be inclined to hold, for the reasons given above, that the exceptions would have to be sustained. But we are of opinion that this question was not in issue in this case, and consequently that the defendant is not aggrieved by the error of the judge on this point, if there was an error in that connection on his part.

The issues raised by the pleadings in the case at bar were two, and two only, namely: (1) Did the defendant originally owe the

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plaintiff for the groceries set forth in the account annexed? and (2) If it did, has it paid for them? At the trial the defendant conceded that the plaintiff was right on the first issue, and relied on the issue of payment alone. Its contention on that issue was that the three checks here in question, sent by the treasurer in September and October, 1908, in payment of his individual debt to the plaintiff, in legal contemplation operated as payment for groceries sold by the plaintiff to the defendant some nine or ten months later, in May, June and July, 1909. The theory on which the defendant has sought to support this contention is that where a payment is made to a creditor to whom debts are due from two persons, the debtor whose money was remitted is the debtor who is entitled to the credit resulting from the payment. That is true where the money remitted as a payment is remitted generally, without directions as to its application. But that doctrine has no application to a case where the payment is accompanied by a direction as to its application. In case money of a corporation is wrongfully remitted in payment of the personal debt of the individual making the remittance and the corporation is in a position to complain of the wrongful use of its money, it can recover back the money so paid. But that wrongful payment is not (in the absence of an agreement to that effect) a payment by the corporation of its debt to the creditor. Of course under such circumstances as we have in the case at bar the creditor and the corporation could agree that the payment should stand as a payment by the corporation, as was done in *Campbell* v. *Mathews*, 6 Wend. 551, relied on by the defendant. But in the absence of such an agreement the wrongful remittance in payment of the personal debt is ground for an action by the corporation to recover the money wrongfully paid to and received by the creditor, but the wrongful remittance cannot operate as a payment by the corporation of its debt to the creditor. And to that effect see *Borden* v. *Sackett*, 113 Mass. 214.

This point has been insisted upon by the plaintiff in this court. It does not directly appear that it was raised at the trial. The fact that the plaintiff excepted to the admission in evidence of the three checks here in question leads us to think that it may have been raised there. But however that may be,

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if we should assume that the case was tried in the court below without reference to the pleadings, and if for that reason we should sustain the exception to the finding, the case would have to go back for a new trial on the right of the defendant corporation to recover in a declaration in set-off which has not yet been filed. On the other hand if the case is not sent back for a new trial the defendant, by bringing a new action, will be in as good a position as if it should file a declaration in set-off in the case at bar. Under these circumstances we are of opinion that the defendant should be confined in the case at bar to its rights under the present pleadings. Under those pleadings the error made by the judge (if an error was made by him) is on a matter not in issue, and therefore if an error was made it was an error by which the defendant was not aggrieved.

Exceptions overruled.

W. V. Taylor, for the defendant.
G. A. Gaskill, for the plaintiff.

MAYOR AND ALDERMEN OF TAUNTON, petitioners.

Bristol. October 24, 1910. — November 22, 1910.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Grade Crossing Acts. Old Colony Street Railway. East Taunton Street Railway. Statute, Construction.

The last sentence of St. 1906, c. 463, Part I. § 29, which is in substance a re-enactment of the corresponding provision in St. 1902, c. 440, § 1, provides as follows: "Upon all petitions hereafter filed, and upon all now pending on which no commission has been appointed, for the abolition, discontinuance or alteration of grade crossings, any street railway company having a location in the part of the public way where the crossing exists, shall be made a party and entitled to be heard as such." Upon a petition of the mayor and aldermen of Taunton for the abolition of certain grade crossings of the railroad of the Old Colony Railroad Company in that city, the Old Colony Street Railway Company was made a respondent. The street railway company appeared specially and filed a motion that the petition be dismissed as against it, on the ground that its predecessor in title, to whose rights it had succeeded, had tracks located on the parts of the public ways where these grade crossings were sought to be abolished before the enactment of St. 1902, c. 440, and that at the time of the enactment of that statute petitions were pending for the abolition of these crossings on

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which commissions had been appointed, and that the predecessor in title of the railway company was not made a party to those proceedings. It appeared that these previous petitions were dismissed by the court without prejudice, by agreement of all the parties thereto. *Held*, that the exception in the statute of pending petitions on which commissions had been appointed applied only to cases where the proceedings were pursued to a determination of the rights of the parties, and did not extend to petitions which were dismissed without prejudice by agreement of the parties, leaving their rights to be determined afterwards under the laws applicable to new proceedings, and therefore that the street railway company properly was made a party to such new proceedings and its motion to dismiss the petition as against it should be denied.

The special act St. 1901, c. 205, entitled "An Act relative to the grade crossing of the Old Colony Railroad and the East Taunton Street Railway at Chace's Crossing in the city of Taunton," which allowed the East Taunton Street Railway Company to intervene and become a party to the proceedings upon the consolidated petitions then pending in regard to the abolition of certain grade crossings in Taunton, does not take the crossings referred to out of the operation of the general laws, and therefore the provisions of St. 1902, c. 440, and St. 1906, c. 463, Part I. § 29, are applicable to them.

KNOWLTON, C. J. This is a petition of the mayor and aldermen of Taunton for the abolition of certain grade crossings of the Old Colony Railroad, filed on December 29, 1909. The Old Colony Street Railway Company was also made a party respondent, and after appearing specially, it filed a motion to dismiss the petition, so far as that corporation was concerned, on the ground that it was not properly joined as a party to the proceedings.* The petition was brought under the St. 1906, c. 463, Part I. § 29, the last sentence of which is as follows: "Upon all petitions hereafter filed, and upon all now pending on which no commission has been appointed, for the abolition, discontinuance or alteration of grade crossings, any street railway company having a location in the part of the public way where the crossing exists, shall be made a party and entitled to be heard as such." This is, in substance, a re-enactment of a part of the St. 1902, c. 440, § 1. This respondent is one of the class of street railway companies referred to in the statute, and comes within its language. The ground of the motion to dismiss is that the predecessors in title of the respondent, to whose rights it has succeeded, had tracks located on the parts of the public ways where these

* In the Superior Court *Pierce*, J., made an interlocutory decree denying the motion, and reported the questions raised by the motion for determination by this court.

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grade crossings are sought to be abolished, before the enactment of the St. 1902, c. 440, and that, at the time of the enactment, petitions were pending for the abolition of these crossings, on which commissions had been appointed, to which proceedings the respondent's predecessors were not parties, and, under the statutes then existing, could not be made parties. It appears that these petitions were afterwards dismissed by the court without prejudice, by agreement of all the parties thereto, and the present petition was subsequently brought. The contention is that, because the respondent's predecessors in title could not properly be made parties to the proceedings then pending, the respondent cannot now be made a party to the present proceeding.

The decision depends upon the true meaning and construction of the St. 1902, c. 440, § 1, which is re-enacted in the St. 1906, c. 463. This act marks a change in statutory provisions and in the policy of the law. *Aldermen of Fitchburg* v. *Boston & Maine Railroad*, 203 Mass. 304, 310. In general, it makes the street railways referred to parties entitled to be heard, and liable for a share of the expenses in all future proceedings. It also brings such street railways into the same class in all cases of pending proceedings where no commission has been appointed. It excepts and puts into a separate class such street railways, in cases of pending proceedings where a commission has been appointed, provided the proceedings are followed to a determination of the rights of the parties; but it makes an exception of these street railways only as to what may be done in the proceedings then pending. The reason of this exception is doubtless to enable the parties, where much expense has been incurred and the proceedings are near their end, to go on under the existing law, rather than to bring in new parties whose interests might require a rehearing from the beginning.

There is nothing in the statute which precluded the court from dismissing the petition without prejudice, by agreement of the parties, and leaving them to determine their rights afterwards, under the laws applicable to the new proceedings. Upon the true construction of the statute there is no doubt of its constitutionality. *In re Mayor & Aldermen of Northampton*, 158 Mass. 299. *Providence, Fall River & Newport Steamboat Co.* v. *Fall River*, 183 Mass. 535.

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The respondent also contends that the St. 1901, c. 205, which was a special act, takes the crossings referred to out of the provisions of the general laws, so that the statutes of 1902, c. 440, and 1906, c. 463, Part I. § 29, are not applicable to them. This contention is founded on a misconstruction of the special act. It is entitled, "An Act relative to the grade crossing of the Old Colony Railroad and the East Taunton Street Railway at Chace's Crossing in the city of Taunton." It allowed the East Taunton Street Railway Company to intervene and become a party to the consolidated petitions in regard to the crossings now in question, and contained full provisions as to the abolition of Chace's Crossing, and no provisions as to the other crossings. It ended with this sentence: "In all other respects the proceedings under said petitions and the rights and liabilities of the parties in interest shall be as specified in said chapter four hundred and twenty-eight, and in the acts in amendment thereof and in addition thereto." The respondent argues that in this sentence there was special legislation designed particularly for these other grade crossings, and establishing permanently the rights of the parties as defined in said chapter four hundred and twenty-eight and in the amendatory and additional acts that had then been passed. On the contrary, the meaning of the statute is that these provisions relative to Chace's Crossing shall not affect the rights of the parties at other crossings, but that they shall be left to be governed by general laws. As here used, the words "acts in amendment thereof and in addition thereto," include all general legislation, affecting that chapter, that had been enacted or that might afterwards be enacted.

Decree affirmed.

E. W. Burdett & F. M. Ives, for the Old Colony Street Railway Company.

D. Malone, Attorney General, *& F. B. Greenhalge*, Assistant Attorney General, for the Commonwealth, were not called upon.

D. G. O'Keefe, for the petitioners, was not called upon.

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WILLIAM H. THORNLEY *vs.* J. C. WALSH COMPANY.

Bristol. October 24, 1910. — November 22, 1910.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Receiver, Ancillary. *Corporation. Conflict of Laws.*

Certain creditors of a foreign corporation, which had been engaged in the construction of buildings under contracts with the owners, had valid and enforceable mechanics' liens upon certain land and a building constructed thereon by the corporation in the State of its incorporation for the payment of claims which under the contract of the owner with the corporation had to be paid before anything became due from the owner, so that a receiver of the corporation, appointed in proceedings in the State of its incorporation, in order to obtain from the owner the balance due upon the contract, was compelled to allow payments to such creditors in full. Ancillary receivership proceedings were instituted in this Commonwealth, in which a Massachusetts creditor proved an unsecured claim before the receiver. *Held*, that such Massachusetts creditor had no right to payment of his claim in full from the assets in possession of the Massachusetts receiver, but could insist only upon being allowed to share on equal terms with other unsecured creditors of the corporation, wherever they resided.

Where a Massachusetts creditor of a foreign corporation, who has proved his claim in receivership proceedings in this Commonwealth ancillary to proceedings against the corporation in the State of its incorporation, has been given an opportunity also to prove his claim in the proceedings in the other State, and has refused to do so, he cannot object to a distribution of the assets in the hands of the Massachusetts receiver among creditors who have proved in both proceedings, irrespective of their places of residence.

In an ancillary receivership in the courts of this Commonwealth, preference will not be given to domestic creditors unless it appears that there is danger of discrimination against them in the forum of the principal receivership, and then only so far as is necessary to counteract such discrimination.

In receivership proceedings against a foreign corporation in courts of this Commonwealth, ancillary to similar proceedings against the corporation in the State of its incorporation, it is proper for the court, in order to secure equality of distribution among all creditors, where Massachusetts creditors have been allowed to prove their claims before the original receiver, to allow foreign creditors to prove their claims here.

BILL IN EQUITY, filed in the Superior Court for the county of Bristol on January 15, 1908, for the appointment of a receiver of the property in this Commonwealth of the defendant, a Rhode Island corporation, who should be ancillary to a receiver appointed in similar proceedings against the same corporation in the Superior Court of Providence County, Rhode Island.

The case previously was before this court on an appeal by a

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creditor, Jerome C. Borden, from the decree appointing the ancillary receiver, and is reported in 200 Mass. 179. After that decision, the case was heard by *DeCourcy*, J., upon the question of the allowance of the receiver's final account. Jerome C. Borden, a creditor, alone opposed the allowance of the account. From the account it appeared that, after the payment of the expenses of the Massachusetts receivership, there was in the possession of the receiver $2,910.61 for distribution according to orders of the court; that one hundred and ten creditors had proved their claims before the Massachusetts receiver, of whom seventy-two were residents of Rhode Island, thirty-two were residents of Massachusetts, and six were residents of other States. Among the claims so allowed was that of Jerome C. Borden for $2,159.35.

The following facts were agreed upon by the parties:

"The defendant, previous to the appointment of a receiver in either State had entered into two contracts in similar form, one for the construction of a church at Centredale, Rhode Island, and the other for the construction of an academy and convent at Fall River, Massachusetts. Each contract contained the following clause: 'If at any time there shall be evidence of any lien or claim for which, if established, the owner of said premises might become liable, and which is chargeable to the contractors, the owner shall have the right to retain out of any payment then due or thereafter to become due an amount sufficient to completely indemnify him against such lien or claim. Should there prove to be any such claim after all payments are made, the contractors shall refund the owner all moneys that the latter may be compelled to pay in discharging any lien on said premises made obligatory in consequence of the contractor's default.'

"The statute with reference to mechanics liens in Rhode Island is as follows: 'Section 1. Whenever any building, canal, turnpike, railroad or other improvement shall be constructed, erected or repaired by contract with or at the request of the owner thereof, such owner being at the time the owner of the land on which the same then is, or by the husband of such owner with the consent of his wife in writing, such building, canal, turnpike, railroad or other improvement, together with the said land, is hereby made liable and shall stand pledged for

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all the work done in the construction, erection or reparation of such building, canal, turnpike, railroad or other improvement, and for the materials used in the construction, erection, or reparation thereof, which have been furnished by any person before any other lien which shall originate subsequent to the commencement of such erection, construction or reparation on such land.'

"Under this statute the Union Hardware & Supply Co., of Providence, R. I., had a lien for materials amounting to $135, and other parties had two small claims (about $24) for labor, both against the church at Centredale, Rhode Island, and these sums were paid to the lienors at the time of the settlement under the contract with the Rhode Island receiver, the owner insisting upon such payment under the provisions of his contract.

"Jerome C. Borden furnished materials used in the construction of the academy and convent in Fall River, Massachusetts, to the amount of his claim as allowed in this case, and previous to the appointment of the receiver brought an action in the Superior Court in the Commonwealth, summoning the owner as trustee, which suit was pending at the time when the receiver was appointed. [This attachment was dissolved and the amount due from the owner to the defendant was paid to the receiver under an interlocutory decree in these proceedings.]

"It is agreed that if the materials furnished by Jerome C. Borden had been furnished in the State of Rhode Island upon a similar structure in Rhode Island he could (at the time of bringing his trustee action) have enforced payment for $52.50 of his claim under the Rhode Island lien law and under his aforesaid contract, but that he could not at that time have enforced his lien in Massachusetts under the Massachusetts law, because he did not give his notice under the Massachusetts law at the time when he furnished the material."

It further appeared that, in the decree appointing the receiver in the Rhode Island proceedings, the court had fixed a time, after which claims which had not been filed with the receiver should be "forever barred from participation in the assets . . . except as it may be otherwise specially ordered by the court." Borden did not file his claim with the receiver in Rhode Island. At the hearing in the Superior Court this fact was stated, whereupon

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the receiver in open court stated that Borden might then file his claim with the original receiver (who was the same person as the receiver in Massachusetts), and that no objection would be made on account of the lateness of such filing. The counsel for Borden refused so to file his claim.

A final decree was entered allowing the account of the receiver, "but without prejudice to the rights of Massachusetts creditors to participate in the distribution of the Rhode Island assets, and the receiver is hereby authorized and directed . . . to pay the net balance of the funds in his hands to the parties or their attorneys of record in this cause entitled thereto" in the sum of $2,910.61, "to the creditors as appear in said account of the receiver and pro rata among the creditors and for the amounts set out [in the schedule of creditors who had proved in the Massachusetts proceedings] upon their claims therein set forth."

Jerome C. Borden appealed.

The case was submitted on briefs.

A. S. Phillips, for the defendant Borden.

W. H. Thornley (of Rhode Island) *& D. F. Slade* for the plaintiff.

SHELDON, J. The only funds in the hands of the ancillary receiver are the proceeds of his collection of the amount due to the Walsh Company for the construction of certain buildings in Fall River. The appellant's claim is against the Walsh Company for materials supplied to it by him for that construction. He has, however, no lien upon the land or buildings or upon the fund in the hands of the receiver, and stands as an unsecured creditor. He can maintain no such lien under the statute of Rhode Island, because the land is situated wholly in this Commonwealth. He has none under our statutes because he gave no notice to the owner of the land in accordance with the provisions of R. L. c. 197, § 3. His attachment by trustee process has been dissolved by the appointment of the receiver. R. L. c. 167, § 126. *Second National Bank* v. *Lappe Tanning Co.* 198 Mass. 159.

In this state of the facts and under the provisions of R. L. c. 167, § 127, as the claim of the appellant has not been paid in full, the funds in the hands of the ancillary receiver must be distributed here in such a manner as to secure as far as possible equal-

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ity of domestic creditors with those who are resident elsewhere. *Buswell* v. *Order of Iron Hall*, 161 Mass. 224. But there is no foundation for the contention that because some foreign creditors, having demands of a nature similar to that of the appellant, are secured by a mechanic's lien given by their local law and so may obtain payment in full, therefore the appellant must be paid in full to be put upon an equality with them. He is simply to be put upon an equality with other creditors who stand in the same position as himself, that is, with other unsecured creditors. *American Loan & Trust Co.* v. *Northwestern Guaranty Loan Co.* 166 Mass. 337.

Nor is it material that a further dividend may be received by creditors who have proved their demands in Rhode Island under the principal receivership. The appellant has had like opportunity to prove his demand there. When the decree appealed from was entered, it was stated in open court that he "might then file his claim with the petitioner as original receiver, and that no objection would be made on account of the lateness of such filing"; and his counsel refused to do so. There is nothing to indicate that if he had accepted this offer he would not be allowed to participate in any distribution to be made in Rhode Island. Nor was his refusal put upon any such ground. *Gerding* v. *East Tennessee Land Co.* 185 Mass. 380.

In an ancillary receivership in our courts, preference will not be given to domestic creditors unless it appears that there is danger of discrimination against them in the forum of the principal receivership, and then only so far as is necessary to counteract such discrimination. It does not appear that there is in this case any such danger. And it was proper for the court, in order to secure equality of distribution among all creditors, to allow foreign creditors to prove their claims here, just as creditors resident here apparently have been allowed to prove their claims in the proceedings in Rhode Island. *Garham* v. *Mutual Aid Society*, 161 Mass. 357.

The decree appealed from must be affirmed.

So ordered.

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PIERRE G. BLAIS *vs.* GERTRUDE CLARE.

Bristol. October 24, 1910. — November 22, 1910.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Way, Private, extent of easement. *Evidence*, Extrinsic affecting writings, Materiality. *Deed*, Construction.

Whether the reasonable use of a right of way over a strip of land ten feet wide belonging to the owner of the adjoining lot on a city street, which leads along a division fence to the street, is inconsistent with the maintenance by the owner of such adjoining land of suitable gates at the ends of the way in the division fence and upon the street, where the manner of use is wholly undefined by the deed granting the right of way, besides a question of law involves the question of fact, what is a reasonable use of the property of the respective parties.

Upon the question, whether the reasonable use of a right of way over a strip of land ten feet wide belonging to the owner of the adjoining lot on a city street, which leads along a division fence to the street, is inconsistent with the maintenance by the owner of such adjoining land of suitable gates at the end of the way in the division fence and upon the street, where the deed granting the right of way merely used the words "Together with a right of way over a strip of my land next adjoining the above lot, ten feet wide, and extending back from the street seventy-five feet," it is competent for the owner of the servient land, claiming the right to maintain the gates, to show that for at least twenty-five years before the owner of the right of way purchased his lot, including a period when the two lots were owned by the same person but were occupied by different persons, a driveway for carriages was used very nearly in the place where the way ten feet wide was established by the deed and that gates were maintained in the fence near the boundary line afterwards established by the deed and also at the entrance to the way from the street, the method of using the driveway by former owners and occupants under substantially the same conditions being some evidence of what was reasonable and convenient in the occupation and enjoyment of the property.

Where the meaning of the parties to a deed as to the nature or extent of an easement granted by it is left doubtful by the language of the instrument, evidence of the subsequent use of the premises by the parties is competent as showing their construction of the deed.

In a suit in equity by the owner of a lot on a street of a city, to restrain the defendant, who was the owner of the adjoining lot over which the plaintiff had a right of way, from obstructing such way by maintaining gates at each end of it, it appeared, by a master's report, that on each of the lots there was a cottage house, the plaintiff's house being about eighteen and a half feet and the defendant's house about sixteen and a half feet from the boundary line, on which there was a fence, that the plaintiff's right of way was created by a grant in these words, "Together with a right of way over a strip of my land next adjoining the above [the plaintiff's] lot, ten feet wide, and extending back from the street seventy-five feet," that the defendant placed and maintained a gate thirteen feet wide in the division fence and also a gate ten feet wide across the entrance to the

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way from the street on which both lots faced, that the houses on the lots were occupied as the homes of the plaintiff and of the defendant respectively and had yards of considerable size about them, that the street was a much travelled way with an electric car line upon it, that the family of the defendant at times had been annoyed by animals straying from the street upon the defendant's land when the gates were left open and that one member of the defendant's family was a child three years of age, that for at least twenty-five years before the plaintiff purchased his lot a driveway for carriages was used very nearly in the place where the plaintiff's right of way was established by the deed, that during that time gates had been maintained in the fence near the present boundary line and at the entrance to the defendant's lot from the street, and that both of these gates had been kept closed except when the driveway was in use for carriages or teams, that the former occupants of both houses used the driveway for teams but that it was not used generally by persons on foot. The master found upon evidence introduced by the plaintiff, that gates to driveways on premises in the neighborhood usually were kept open by the owners and occupants for their own convenience. The master found that, if the defendant had the right to maintain gates, the gates maintained by him were suitable ones. *Held*, that, on the facts found by the master, a reasonable and proper use of the houses and lands of the parties and of the plaintiff's right of way over the defendant's land permitted the maintenance by the defendant, against the plaintiff's objection, of convenient and suitable gates such as these were found to have been.

BILL IN EQUITY, filed in the Superior Court on June 26, 1909, to restrain the defendant from obstructing by gates a right of way owned by the plaintiff over the land of the defendant on the easterly side of Bay Street in Taunton.

The case was referred to L. Elmer Wood, Esquire, as master. The master filed a report in which he made the findings which are stated in the opinion. The plaintiff filed a single exception to the master's report on the ground "that the defendant was allowed to introduce evidence relating to the maintaining and closing of the said gates by former owners of the dominant and servient estate prior to June 3, 1909, to vary and limit the terms of the grant by parol evidence." June 3, 1909, was the date on which the master found that the plaintiff took down a part of the fence, which at that time divided the land of the plaintiff from that of the defendant, and the defendant built a new fence on the street and on part of the boundary line and put in place the gates which the plaintiff sought to enjoin her from maintaining.

The case was heard by *De Courcy*, J., who overruled the plaintiff's exception to the master's report, and confirmed the report. He made a final decree that the plaintiff's bill be dismissed; and the plaintiff appealed.

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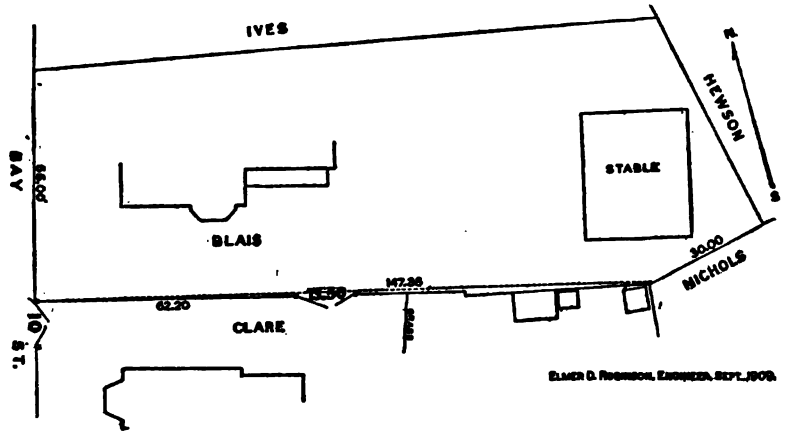
Below is a reduced copy of the plan used at the hearing before the master and afterwards before this court.

The case was submitted on briefs.

N. Lemaire, Jr., for the plaintiff.

A. Fuller & W. J. Davison, for the defendant.

KNOWLTON, C. J. The plaintiff and the defendant are the owners of lots of land adjacent to each other on the east side of Bay Street in Taunton. On each lot there is a cottage house occupied by its owner. The nearest point of the plaintiff's house is about eighteen feet and a half northerly of the division line between the two lots, and the nearest point of the defendant's house is about sixteen feet and a half southerly of this line.



The plaintiff has erected a stable near the rear of his lot. There is a fence upon the boundary line, and the plaintiff has a right of way over the defendant's land, which was created by a grant in these words: "Together with a right of way over a strip of my land next adjoining the above lot, ten feet wide, and extending back from the street seventy-five feet." The defendant has placed a gate thirteen feet wide in a gateway in the division fence, and she also maintains a gate ten feet wide across the entrance to the way at Bay Street. The only question in the case is whether the way should be left open as contended by the plaintiff, and at all times unobstructed by gates.

This question involves considerations of fact as well as a question of law. The matters of fact relate to the question, What

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is reasonable in the use of the property of the respective parties. The plaintiff has a right to use the way in a reasonable manner, having regard to the correlative right of the defendant to use her property in a reasonable way, in reference not only to her own benefit and convenience, but also to the benefit and convenience of the plaintiff. Both lots are occupied as the homes of the owners, who have yards of considerable size about their houses. The street is a much travelled way, with an electric car line upon it, and the defendant's family have been annoyed at times by animals straying from the highway upon her premises, when the gates were left open. One member of her family is a child three years of age.

The grant creating the right of way was made on November 30, 1908. The plaintiff purchased his property on January 27, 1909. For at least twenty-five years before that date a driveway for carriages was used very nearly in the place where the present way was established by the deed, and gates were maintained in the fence near the present boundary line, and also at the entrance to the defendant's lot from Bay Street. Before the purchase of his property by the plaintiff, and until January 3, 1909, the gates on the street and in the rear were kept closed, except when the driveway was in use for carriages or teams. Former occupants of both houses used the driveway for teams, but it was not generally used for foot passengers. It appears that gates to driveways on premises in the neighborhood were usually kept open by owners and occupants for their own convenience. The master has found that if the defendant has a right to maintain gates, all the gates maintained are suitable.

The only exception to the report was to the admission of testimony of the method of using the driveway by former owners and occupants. Where the intent and meaning of the parties in the use of language in a deed is doubtful, the construction put upon it by them in their subsequent use of the premises is always competent to aid in the construction of it. *Lovejoy* v. *Lovett*, 124 Mass. 270, 274. *Stone* v. *Clark*, 1 Met. 378. We are also of opinion that the use of the premises for many years while the way was in use by the occupants of the adjacent lots, under substantially the same conditions, even while the houses and lots were in the same ownership under the occupation of different

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parties, is some evidence of what was reasonable and convenient in the occupation and enjoyment of the property. There was no error in the admission of this testimony.

In the Superior Court there was a decree for the defendant, and the plaintiff appealed. The question is whether, upon the findings of the master, a reasonable and proper use of the houses and lands of the parties and of the way connected therewith permitted the maintenance of convenient and suitable gates against the plaintiff's objection. We are of opinion that the case is governed by the decision in *Short* v. *Devine*, 146 Mass. 119, in which the facts were similar, and the principles of law were fully discussed with a review of the authorities. In the situation and extent and use of the adjacent lots, we think the facts of the present case are more favorable to the defendant than in the case just cited; and the same is true of the practice of previous occupants in the use of their premises for many years. In the case cited it did not appear what the usage was in regard to having fences in front of houses and gates at the entrance of yards. In the present case the finding, upon evidence introduced by the plaintiff, that gates to driveways in this neighborhood were usually kept open for the convenience of the owners and occupants, includes a finding that gates were maintained at such places; and they could hardly be maintained except for the purpose of being used whenever there was occasion to use them, even though they were usually left open. This finding implies that they were sometimes shut; and it is favorable to the defendant's claim of a legal right to maintain her gates.

Decree affirmed.

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TWITCHELL-CHAMPLIN COMPANY *vs.* JOSEPH S. RADOVSKY.

Bristol. October 24, 1910. — November 22, 1910.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Sale, Delivery. *Contract*, Construction, Custom of trade.

If goods are shipped by rail to a buyer under the terms of a contract of sale, the fact that a discount is made from the price equal to the cost of transportation does not prevent the application of the familiar rule that, in the absence of an agreement or usage to the contrary, when goods are to be shipped by rail delivery to the carrier is delivery to the buyer and the title passes at the time of such delivery.

The stipulation in a contract in writing for a sale of goods "Price guaranteed against our own price up to time of shipment" here was shown to mean, as understood by the trade, that the seller would give the buyer the benefit of any drop in the price of the kind of goods sold which the seller gave to other customers although this would make the price less than the price named in the contract.

CONTRACT, with a first count upon a contract in writing for $510 as the price of one hundred and fifty cases containing six hundred dozen clams, alleged to have been delivered to the defendant under the contract, and a second count upon an account annexed for the same amount. Writ dated August 17, 1908.

In the Superior Court the case was tried before *Fox*, J., without a jury.

The plaintiff put in evidence a contract, in writing, the material portion of which was as follows:

"2|13 1909.

Sold to J. S. Radovsky
At Fall River, Mass.
How Ship — Rail. When — As below.
Terms: — 1½% — 10 days.
300 cls P|L 6 oz. Clams 1200 - - - - - - - - - - 90
less frt.

½ to be shipped when packed about May — balance July shipment — price guaranteed against our own price up to time of shipment.

To take place of previous contract.

J. S. Radovsky
The Twitchell-Champlin Co.
by Frank A. Bott."

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One hundred and fifty cases of these goods had been shipped in May and paid for. The plaintiff's shipper testified that he was in charge of the shipping department of the plaintiff, and that he knew that the clams in question, namely, the remaining one hundred and fifty cases, were shipped. The defendant testified that he received no bill of lading and no other notice in writing of that shipment or of the arrival of the clams except the invoice printed above. The defendant testified, however, that he might have known of the arrival of the clams at the station in Fall River. He testified that he did not take them from the station and that he refused to take the clams because he bought them less freight and the bill was marked "f. o. b. Boston." The price named in the contract between the parties was ninety cents less freight, and the first shipment of one hundred and fifty cases was billed at that price and was paid for. The second shipment of one hundred and fifty cases was billed at eighty-five cents f. o. b. Boston.

It appeared that ninety cents was the price per dozen cans and that there were six hundred dozen cans in one hundred and fifty cases.

It was contended by the defendant that he was entitled to a deduction of five cents a dozen from the contract price under the guaranty contained in the contract, as follows: "Price guaranteed against our own price up to time of shipment," and that the second invoice should have been billed to him at eighty-five cents less freight instead of eighty-five cents f. o. b. Boston, and that because of that overcharge he had a right to reject the goods. Upon this point the evidence was in substance as follows:

Upon the receipt of the invoice for the second lot of clams the defendant immediately returned it with the statement that he could not use the clams at the above price, and the plaintiff mailed the invoice back to the defendant with no further comment.

Bott, who made the contract with the defendant for the plaintiff, testified on cross-examination that "f. o. b. Boston" meant that the freight was to be paid by the defendant; that at the time he closed the order with the defendant the plaintiff's price was ninety cents f. o. b. Boston, and that he allowed the defendant a concession of the freight because of the size of the

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order and also for the purpose of getting the defendant's business for the future.

The plaintiff's witnesses testified that at the time they sent the second invoice to the defendant on July 15, 1908, their price was eighty-five cents f. o. b. Boston in sales of twenty-five cases or over, ninety cents f. o. b. Boston on sales of fifteen cases, and ninety-five cents f. o. b. Boston on sales of five cases.

The defendant testified that the understanding by the trade as to the guaranty contained in the contract of sale was that if the market declined the buyer got the benefit. "Q. Assuming the price went down ten cents what would be the benefit that would be allowed? A. That would be ten cents a dozen. — Q. What would be the understanding by the trade when the list price is f. o. b. Boston ninety cents and if it is then reduced to eighty-five cents f. o. b. Boston? A. Five cents." This evidence was not contradicted by the plaintiff or its witnesses, although the plaintiff's witnesses all were in court at the time that the testimony was given.

Bott further testified that after the drop in price he came to Fall River, saw the defendant, and told him "that they would be able to make a little better price on clams, and would be able to fill his order at eighty-five cents Boston," adding, "He seemed well satisfied at the time and I considered the matter settled. We shipped the order according to the contract."

The defendant testified as to this conversation that Bott came to him and told him that the clams had declined five cents a dozen and that the defendant's price would be reduced accordingly.

At the close of the evidence the defendant asked the judge to make the following rulings:

1. Upon all the evidence judgment should be for the defendant.
2. Upon all the evidence the title to the goods never passed to the defendant.
3. Upon all the evidence there was no delivery of the goods to the defendant.
4. Upon all the evidence the plaintiff cannot recover the sale price of the goods.
5. The defendant had a right to reject the goods upon the terms offered.

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6. The title to the goods does not pass to the consignee by delivery to the carrier where freight is paid by the consignor.

7. A fair construction of this contract is that the defendant was to receive the benefit of any decline in price from the time that the contract was made up to the time of shipment.

8. Upon all the evidence the plaintiff failed to give the defendant the benefit of that decline of five cents per dozen.

The judge made the seventh ruling requested as above, and refused to make any of the others. He found for the plaintiff in the sum of $510 with interest. The defendant alleged exceptions.

The case was submitted on briefs.

D. R. Radovsky, for the defendant.

A. S. Phillips, for the plaintiff.

BRALEY, J. The defendant contends, that, as the goods when packed were to be shipped to him by rail at a price from which the cost of transportation was to be deducted, the title did not pass until their arrival at his place of business. But there was no express clause in the agreement that this expense was to be borne by the seller, and, while the amount undoubtedly measured what the buyer would have to pay for carriage, the stipulation could be found to have been intended by the parties as a discount from the seller's regular prices, and not as a prepayment of the freight. The question was one of fact, and the finding for the plaintiff, having been warranted by the evidence, cannot be revised. *Suit* v. *Woodhall*, 113 Mass. 391. *American Malting Co.* v. *Souther Brewing Co.* 194 Mass. 89. It being settled that, unless there is an agreement or usage of the trade to the contrary, delivery to the carrier is a delivery to the buyer, when the sale becomes complete, the case at bar falls within this familiar rule, and, the title having passed, the refusal of the defendant to accept the clams was unjustifiable, and furnishes no defense to the action for the price. *Barrie* v. *Quinby*, 206 Mass. 259. The plaintiff concedes, and the judge so ruled, that by a fair construction of the contract the defendant was entitled to the benefit of any decline in price during the period between the date of sale and the time of the shipment of the last invoice. But his further contention, that in the adjustment of the amount due, the plaintiff having allowed on the first invoice a special

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discount below the regular price charged to other customers, he was bound on the second invoice to make a similar discount, is not in accordance with the terms of sale. The agreement was to give him the benefit of any drop in prices which they gave to other customers even if less than the contract called for, and, the price charged having been upon this basis, the defendant has no ground of complaint.

The requests were rightly refused, and the exceptions must be overruled.

So ordered.

EPHRAIM DURANT *vs.* HOLBROOK, CABOT AND ROLLINS CORPORATION.

Bristol. October 25, 1910. — November 22, 1910.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Evidence, Opinion: experts.

In an action by a workman against his employer for personal injuries from being struck by a heavy plank which was being lowered by means of a derrick without the use of a tag rope, a witness qualified as an expert may be allowed to testify that he has heard the description of the derrick and of the plank that was being lowered by it, and that in his opinion the derrick, thus used without a tag rope to keep the plank from swinging in, was not a suitable appliance for hoisting.

TORT for personal injuries sustained by the plaintiff on August 20, 1907, from being struck by a heavy plank which was being lowered, while he was in the employ of the defendant and was at work as a carpenter on a caisson on the Somerset shore of the Taunton River, the caisson being in process of construction for use in the erection of a new bridge across that river between the city of Fall River and the town of Somerset. Writ dated September 30, 1907.

At the trial in the Superior Court before *Stevens*, J., the plaintiff finally relied upon the second and third counts of his declaration, one alleging negligence in the failure of the defendant to furnish him with safe ways, works or machinery with which to do his work, and the other alleging negligence of a superintendent or of some one exercising superintendence.

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The general character of the evidence is described in the opinion.

One Nicholson, called by the plaintiff as an expert, testified that he was a contractor of twenty years' experience; that he had been putting up buildings; that he was familiar with derricks and hoisting apparatus, derricks run by boom and mast and the hoisting of things by chains and wire ropes. He was asked the question, "Assuming such a derrick as is described, and such a load, is such a derrick a safe and suitable apparatus without a tag rope or guard rope?" He answered, "No, sir."

Afterwards he was asked, subject to the objection and exception of the defendant, the question, "Is such a derrick as is described, carrying such a load as has been described here, and the load the way it has been described, is it a safe and suitable appliance without a tag rope?" He answered, "No."

The following questions and answers were subject to the same exception: "Q. How would a tag rope be used? A. There should be two tag ropes, one on each end, to pull that out and keep it there until the stick would swing down where the men wanted to put it. — Q. How should it be dropped? A. In the first place the boom should have been long enough to get over here (illustrating). — Q. Assuming that the boom wasn't long enough. A. There should have been a tag rope, it seems to me, so as to pull that out, and had the fall right so they could have dropped it down, and pulled it in with these tag ropes. — Q. Now, Mr. Nicholson, suppose the boom isn't long enough to reach out where the load is to go, suppose this is the boom of the derrick, and it only reached up here in the middle of the caisson, and the load is to go out there, should a tag rope be used then in your opinion? A. Yes, there should be two tag ropes, one on each end. There is nothing to stop that from swinging in if there isn't a tag rope on it. — Q. What is the purpose of putting the tag rope on? A. To keep it swung out there until they lower it. Then there should be somebody there, or shift the tags around and swing it in. — Q. Now, is it a suitable appliance for hoisting, Mr. Nicholson, to have a boom that only reaches out to where the load is to go? Is that a suitable appliance? A. No."

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One Hardy, called by the plaintiff as an expert, testified that he was a general contractor and had been in business eight years in carpentry work and general construction; that previously he had worked for contractors and builders for about fifteen years and was familiar with derricks and hoisting apparatus; that he had heard this derrick described and the load, the timber or plank twenty-five or thirty feet long, twelve inches wide and four inches thick. He then was asked and answered, subject to the objection and exception of the defendant, as follows: "Q. Now, Mr. Hardy, assume a derrick described as this has been in the evidence, carrying the load which has been described here, and assume that derrick is being used and operated without a tag rope or guide rope, is that a safe and suitable appliance? A. I should say not. — Q. Now, assume a derrick where the boom does not come out to the place where the load is to be put, — is that a safe and suitable appliance for hoisting? A. I should say not."

At the close of the evidence the defendant asked the judge to rule (1) that upon all the evidence in the case the plaintiff was not entitled to recover upon either of the counts relied upon, (2) that there was no sufficient evidence to warrant the jury in finding that the plaintiff was in the exercise of due care, and (3) that there was no sufficient evidence to warrant the jury in finding that the defendant, its agents or servants, were negligent.

The judge refused to make any of these rulings, and submitted the case to the jury, who returned a verdict for the plaintiff in the sum of $3,750. The defendant alleged exceptions to the refusal of the judge to make the rulings requested and to his refusal to exclude the expert testimony of the witnesses Nicholson and Hardy. The defendant argued that, the jury having before them full testimony as to the position of all the appliances, such a danger as the swinging in of the plank because of the lack of the restraining force of a tag rope was within their ordinary knowledge and was not a proper subject for the testimony of experts.

D. F. Slade, (*J. H. Kenyon, Jr.*, with him,) for the defendant.

C. R. Cummings, (*J. W. Cummings* with him,) for the plaintiff.

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HAMMOND, J. The principles of law applicable to this case are familiar and well settled; and the case is one of a large class where the bearing of the various parts of the evidence is so obvious that nothing is gained, either in the way of clearness or strength, by an extended discussion of it. It is sufficient to say that after a careful reading of the evidence we are of opinion that the questions, whether the plaintiff was in the exercise of due care, whether he assumed the risk of the situation, whether there was negligence for which the defendant was answerable under either the second or third count, (upon which two counts alone the case was finally submitted to the jury,) and whether the work was being carried on by the defendant, were each and all questions of fact for the jury upon which a decision either way was legally possible. See among other cases *Lang* v. *Terry*, 163 Mass. 138, and cases cited; *Barrett* v. *New England Telephone & Telegraph Co.* 201 Mass. 117, and cases cited. It follows that the motion that a verdict be ordered for the defendant was properly denied, and that the instructions requested by the defendant were properly refused.

There was no error in the admission of the expert testimony. *Lang* v. *Terry*, *ubi supra*.

Exceptions overruled.

ELLEN REAGAN, administratrix, *vs.* UNION MUTUAL LIFE INSURANCE COMPANY.

Bristol. October 25, 1910. — November 22, 1910.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Practice, Civil, Exceptions, Judge's charge. *Insurance,* Life. *Fraud. Conflict of Laws. Evidence,* Opinion: experts. *Words,* "And."

If a presiding judge makes a ruling at the request of the defendant in an action and the jury return a verdict for the plaintiff, the defendant cannot complain of the ruling made at his request; nor can he complain of other rulings, which, although not made at his request, were too favorable to him upon the theory of the ruling which he requested.

The inadvertent use of the word "and" instead of the word "or" between two propositions by a presiding judge in his charge to the jury, affords no ground for exception, if the judge's repeated use of the word "or" in the same connection

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in other parts of his charge must have made it plain to the jury that only one of the two propositions need be established for the purpose in question.

In an action on a policy of life insurance, where the defendant relies on the defense that the policy was obtained by fraud on the part of the insured, if the contract of insurance is governed by the law of another State, and no evidence in regard to the law of that State is introduced at the trial, although the common law of the other State will be assumed to be the same as that of Massachusetts, the provision of R. L. c. 118, § 21, that a misrepresentation made by the insured will not avoid the policy unless it was made with actual intent to deceive or increased the risk of loss, has no application, and the provision of § 73 of the same chapter, that a part of an application of the insured referred to in the policy of which no copy is attached to the policy shall not be received in evidence, also is inapplicable; whereas, if the contract contained in the policy is governed by the law of this Commonwealth, both of those provisions apply. In such an action the presiding judge instructed the jury that the contract of insurance was made in another State, and, although this instruction probably was erroneous, no exception was taken to it and both parties appeared to acquiesce in it. After a verdict for the plaintiff the defendant alleged exceptions, by which it appeared that, whichever law governed the contract, the rulings of the judge were too favorable to the defendant, so that whatever errors the instructions of the judge might have contained in regard to the provisions of the statutes mentioned above, the defendant could not have been prejudiced by them.

In an action on a policy of life insurance, where the defense relied upon is that the policy was procured by fraud of the insured, a witness, qualified as a medical expert, who had seen the insured for a number of years and treated him at a hospital, cannot be asked the question, "Taking into consideration the condition in which you found [the insured] in March, 1901, taking into consideration what he told you about the previous history of the case, whether in your opinion he would have been insurable in October, 1900?" Because the fact that the witness is an expert in matters pertaining to his profession does not qualify him as an expert in the business of insurance so that he can tell in reference to different physical conditions when a man would be insurable.

CONTRACT by the administratrix of the estate of Michael H. Sullivan on a policy of insurance on the life of the plaintiff's intestate. Writ dated August 14, 1903.

In the Superior Court this case first was tried before *White*, J., who ordered a verdict for the plaintiff and reported the case for determination by this court of the question whether under a policy containing the clause which is quoted in the opinion the evidence of fraud which was offered by the defendant was admissible. In a decision, reported in 189 Mass. 555, this court held that the evidence offered by the defendant should have been admitted, and in accordance with the terms of the report ordered that the verdict should be set aside.

There was a new trial before *Stevens*, J., at which the jury

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returned a verdict for the plaintiff in the sum of $1,470. The defendant alleged exceptions raising the questions which are considered in the opinion.

One of the exceptions, mentioned at the end of the opinion, was as follows: Dr. Albert C. Dedrick, called as a witness by the defendant, testified that he had practised medicine in Fall River for twenty-one years, that he was the president of the board of examiners in Fall River for the army and navy, that he formerly examined for the New England Mutual Life Insurance Company, and was at present the local examiner for the Phoenix Life Insurance Company and for two assessment orders, that he had seen the insured for a number of years and had treated him at the city hospital. This witness was asked by the defendant the following question: "Taking into consideration the condition in which you found Michael H. Sullivan in March, 1901, taking into consideration what he told you about the previous history of the case, whether in your opinion he would have been insurable in October, 1900?" The judge excluded the question, and the defendant excepted.

The first part of the judge's charge to the jury was as follows:

"This . . . is an action of contract. The plaintiff says that her intestate made a contract with the defendant company by virtue of which the defendant insured his life for the amount of $1,000. That policy was afterwards assigned to her, and she has a beneficial interest in it, and he claims under that assignment, but she properly brings this action as administratrix of his estate.

"Now, your attention has been called to the provision in this policy as to its incontestability. 'This policy is incontestable from the date of issue for any cause, except non-payment of premium.' Well, with that provision in the policy, gentlemen, you very naturally would ask yourself the question, why is any defense made here? It is for this reason. That provision is contrary to the policy of the law, and it is void. The courts will not sustain that provision in the policy, and for that reason notwithstanding it was made by the company it is a provision by which they are [not] legally bound.

"The defense in this case is that certain misrepresentations were made by Michael H. Sullivan at the time when he made

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his application for insurance, or at the time when he was examined by the examining physician for the defendant company, and in its answer it sets up various causes of defence. It is alleged here that misrepresentations were made, and that this was a fraudulent policy, and never took effect because those misrepresentations were made, and that by virtue of those misrepresentations the defendant company was induced to enter into that contract.

"The burden is upon the defendant to establish that fact, to establish the fact that misrepresentations were made. If you find that misrepresentations were made; — and the law in relation to that I want to read to you — 'No oral or written misrepresentation or warranty made in the negotiation of a contract or policy of insurance by the assured or in his behalf shall be deemed material or defeat or avoid the policy or prevent its attaching unless such misrepresentation or warranty is made with actual intent to deceive or unless the matter misrepresented or made a warranty increased the risk of the loss.' So in relation to these misrepresentations, gentlemen, if they were misrepresentations, there are two questions before you. In the first place were they false misrepresentations, misrepresentations that were made actually with the intent to deceive, or if they were not made with the actual intent to deceive, if they were made honestly, did they increase the risk? Because those are the issues which you are to pass upon.

"There is another provision of the statute, 'Every policy which contains a reference to the application of the insured either as a part of the policy, or as of having any bearing thereon, must have attached thereto a correct copy of the application, and unless so attached the same shall not be considered a part of the policy, or received in evidence.'

"It appears in the case of this policy that the entire application was not annexed to the policy. It is stated in the examination before the physician. 'In continuation of and forming a part of my application for insurance to the Union Mutual Life Insurance.' That was not attached to the policy, and if that had been a Massachusetts policy, if the contract had been executed in Massachusetts, it would not under our statute have

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been possible for the defendant to have made this defense. But it is possible because this is a Maine contract.

"The defendant company was a Maine corporation. Its principal place of business was in the State of Maine in the city of Portland, and the contract was effected in Maine, and that being the fact, it being a Maine contract without the jurisdiction of this court, under our statute as it has been construed by our court, it does not apply to a case like this.

"Now, I have ruled that this application was a part of the application. It is in. You have it before you. You have it with what purports to be the signature of Michael H. Sullivan, and the questions for you to pass upon are whether there were misrepresentations made here, and if there were misrepresentations, whether those misrepresentations were made, in the language of the statute, with the actual intent to deceive, or did the matter misrepresented, or made a warranty, increase the risk of the loss."

After dealing with a question in regard to the identity of the insured, the judge continued as follows: "But if you find that it was the same identical person, that the Michael H. Sullivan whom this plaintiff represents was the man who was actually insured, then you come to the other question, and that is whether or not misrepresentations were made, and if misrepresentations were made were they made either with the actual intent to deceive, or did they increase the risk which was taken by the company."

At the end of the charge the defendant, in the language of the bill of exceptions, "saved its exception to the second paragraph of the charge as above quoted, and to what the court said about the first clause in the policy being absolutely void, stating its claim that the policy is void only so far as fraud is concerned, meaning that the policy is incontestable for every reason except fraud, whereupon the court stated to counsel that for the purposes of this case he would give that instruction, and said to the jury, 'It is incontestable, except as to fraud.' The court declined to give further instruction to the jury on this subject, and saved the defendant's exception."

At the conclusion of his charge the judge gave the following instructions as having been requested by the plaintiff:

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"The plaintiff is entitled to recover unless the defendant satisfied the jury by a fair preponderance of the evidence that the policy was obtained by misrepresentations which either increased the risk of loss, or were made with the actual intent to deceive.

"If the insured without intent to deceive the company misrepresented certain facts that would not avoid the policy unless they increased the risk.

"Unless the jury find that Sullivan intended to deceive, and misrepresented facts which materially increased the risk under the policy, the plaintiff is entitled to recover."

It is the last sentence above quoted which is referred to in the opinion as containing the word "and" used inadvertently for the word "or." The defendant excepted to the giving of these rulings requested by the plaintiff and also excepted "to what the court said to the jury in relation to increase of risk."

A. S. Phillips, for the defendant.

J. M. Morton, Jr., for the plaintiff.

KNOWLTON, C. J. The questions that are now material under the defendant's bill of exceptions are few, and by no means difficult. The policy contains this clause: "This policy is incontestable from date of issue for any cause, except non-payment of premium." In the former decision upon the report in this case, which may be found in 189 Mass. 555, it was held that this provision does not preclude the defendant from showing that the contract of insurance was procured by fraud of the insured.

At the last trial the judge ruled, at the request of the defendant, for the purposes of the trial, that the policy is incontestable except for fraud. The defendant cannot complain of this ruling, which was in accordance with its theory of the case. In this view of the law the only defense open was fraud, and the possibility of innocent false representations of the assured as to matters material to the risk was not properly a subject for the consideration of the jury. Repeatedly in the charge the jury were told that, if the plaintiff's intestate, to procure the policy, made representations to the defendant with intent to deceive, it would preclude recovery. With this the judge coupled, as an alternative that would also preclude recovery, a possible finding that, without intent to deceive, he made misrepresentations as to a matter which increased the risk of loss. Upon the construction

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given to the above quoted clause, at the request of the defendant, this latter instruction was too favorable to the defendant. Nothing less than actual fraud was open as a defense. If the clause had been given the construction to which the judge was at first inclined, namely, that it was wholly void, a different question would have arisen.

In one part of the charge the judge, apparently by inadvertence, used the word "and" instead of "or" between these two propositions that may be relied on to avoid a policy, as they are stated in the R. L. c. 118, § 21; but his repeated use of the word "or" in the same connection in other parts of his charge, was such as must have given the jury a correct understanding of the case upon the instructions taken as a whole.

The judge told the jury that "the contract was effected in Maine," and held that it was governed by the laws of that State. There was evidence tending to show that the policy was delivered and the premium paid in Fall River in this State, and by its terms it was not to take effect until the premium was paid. If, as seems probable, it was a Massachusetts contract, the rights of the parties are to be determined by the laws of this Commonwealth. No exception was taken to the judge's ruling on this point, and it does not appear that there was any difference of opinion between the parties at the trial in regard to it.

If it was a Maine contract, the defense of fraud of the insured in procuring it was open, and the instructions were sufficiently favorable to the defendant. As no evidence was introduced in regard to the laws of Maine, we assume that the common law there is the same as in Massachusetts.

If it was a Massachusetts contract the result would be the same, and if the quoted clause were to be held void, the provisions of the R. L. c. 118, § 21, would be applicable as they were given to the jury in the charge of the judge.

If it was a Maine contract and the R. L. c. 118, § 73, which requires a copy of the application to be annexed to the policy, was not applicable, this part of the instructions of the judge was correct. If it was a Massachusetts contract and the paper relied on by the defendant was a part of the application which could not be put in evidence because not annexed to the policy, the rulings at the trial were too favorable to the defendant.

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The question to the physician was rightly excluded. While he was an expert in matters pertaining to his profession, it does not appear that he was an expert in the business of insurance, so that he could tell in reference to different physical conditions, when a man would be insurable.

In no possible view of the law was the defendant prejudiced by any error at the trial.

Exceptions overruled.

E. EVERETT ANDROVETTE *vs.* EDWARD S. PARKS.

Bristol. October 25, 1910. — November 22, 1910.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Sale. Warranty.

At the trial before a judge without a jury of an action of contract for loss alleged to have been sustained by an unwarranted refusal on the part of the defendant to receive and pay for certain shellac refuse, called "No. 2 keeri lac," which the defendant had agreed to purchase from the plaintiff, the defendant contended that the keeri lac was sold to him by sample, and that that tendered by the plaintiff was not of the quality of the sample. There was evidence tending to show that at the time of the sale neither the plaintiff nor the defendant knew much about the "No. 2 keeri lac," that after an interview between them the plaintiff sent to the defendant a type sample of what he understood "No 2 keeri lac" looked like, that then the defendant agreed in writing to purchase of the plaintiff a certain quantity of "No. 2 keeri lac (Shellac Refuse)" without further description, and that the plaintiff tendered to the defendant what answered to the general character of "No. 2 keeri lac;" and upon abundant evidence the judge found that there was no sale by sample, but that the "so called sample sent by the plaintiff to the defendant was simply intended to represent the general character of 'No. 2 keeri.'" The finding was for the plaintiff; and the defendant alleged exceptions to the refusal of the judge to rule in accordance with his contention. *Held*, that on the facts as found by the judge the contention of the defendant was without foundation.

At the trial of an action for loss alleged to have been caused by an unwarranted refusal on the part of the defendant to receive and pay for certain shellac refuse called "No. 1 keeri lac," it appeared that the defendant agreed in writing with the plaintiff to purchase the merchandise under the description "No. 1 keeri lac" while it still was in India, that on its arrival in New York, in response to a request by the plaintiff that he examine it before shipment, the defendant asked the plaintiff to send him samples. Upon the plaintiff's doing so, the defendant refused the merchandise, asserting that it was not of the right quality. There was no question as to the good faith of the plaintiff in the selection of the

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samples. There was evidence that the merchandise offered answered the description, "No. 1 keeri lac." The judge found for the plaintiff. *Held*, that the finding was warranted.

CONTRACT for loss alleged to have been sustained by reason of the defendant's refusal to receive and pay for three hundred bags of "No. 2 keeri lac" and one hundred bags of "No. 1 keeri lac," which the plaintiff alleged that the defendant had agreed to purchase from him. Writ dated May 2, 1907.

In the Superior Court the case was heard by *Stevens*, J., without a jury. It appeared that the plaintiff was a dealer in shellac and other gums in New York. The defendant was engaged in Fall River in the manufacture of shellac varnish from a refuse gum known as "keeri lac." Keeri lac is the name for the refuse composed of gum and a large portion of bark, sticks, seeds, dirt and other foreign ingredients resulting from the manufacture or preparation of shellac gum in India. This keeri lac is sent to the United States in bags and is sold to varnish and shellac manufacturers who dissolve out the gum by a variety of processes. The best of the keeri lac, which comes from Calcutta, is sometimes sold in the New York market under the designation of "superior or No. 1 keeri lac." Neither the plaintiff nor the defendant were familiar with "No. 2 keeri lac."

On or about June 6, 1906, the defendant, who had never before done any business with the plaintiff, called at the plaintiff's place of business in New York. While there the parties had some talk about No. 2 keeri lac and the plaintiff offered to sell the defendant some. The defendant said he did not know what it was and asked plaintiff whether he had a sample. The plaintiff, according to his testimony, thought he said he had a type sample, merely showing what No. 2 keeri looked like, but that it was not at the moment available. According to the defendant's testimony the plaintiff did not say that it was merely to show what the No. 2 looked like, but did say that No. 2 was the same as the No. 1 except that it had less gum in it. Afterwards the plaintiff submitted a type sample of No. 2 keeri lac to the defendant, on June 7 addressing a letter to the defendant at Fall River offering him two hundred bags of No. 2 keeri lac at five and three-fourths cents per pound. The defendant, after inspecting the type sample, accepted the offer, which a few days later was

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embodied in a contract, of which the following is the substance: "June 11, 1906. Sold to Edward S. Parks. Fall River, Mass. Acc't E. E. Androvette. New York. Two hundred (200) bags No. 2 keeri lac (Shellac Refuse). Invoice shipping weights at Calcutta and tares. . . . ex S. S. 'Bechuana.' Price:— 5¾ cents per pound. . . . Accepted. E. S. Parks. Contract No. 453."

A few days thereafter the plaintiff wrote to the defendant offering him another one hundred bags of No. 2 keeri lac at the same price and also one hundred bags of superior No. 1 keeri lac at twelve cents per pound. The defendant accepted this offer, which in a few days was embodied in a contract similar to the foregoing.

On or about October 1, 1907, the plaintiff made delivery in Fall River of three hundred bags of merchandise purporting to be No. 2 keeri lac. The defendant made examination of the shipment at the railroad, opening about twenty bags. He took from some of these twenty bags a number of samples. These samples, he testified, he considered fair ones and he examined them and concluded he did not want the stuff. As a result of this examination the defendant rejected the entire lot and notified the plaintiff by letter that the merchandise delivered at Fall River was not what he bought; that he had no use for it and could not accept it.

On or about November 1, 1907, the plaintiff notified the defendant that there had arrived from Calcutta the one hundred bags of superior or No. 1 keeri lac and that, on account of the defendant's having rejected the other shipment, he preferred not to send them to Fall River and would like to have the defendant make a dock examination at New York and accept or reject the goods at that place. The defendant replied that, if the goods were No. 1 keeri lac, he would accept them, and requested the plaintiff to draw samples and send them to him. In consequence of this the plaintiff drew samples from the goods on the dock and sent the same to the defendant. The defendant made examination of these samples and notified the plaintiff that if they were fair samples he would not accept the lot as No. 1 keeri lac. The plaintiff replied that the goods were No. 1 keeri lac and that he should cause them to be sold and any loss charged

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to the defendant. The plaintiff testified that two days later, having been notified by the steamship company to remove the goods, he resold both lots at a loss.

The bill of exceptions contained the following statement: "The defendant's counsel stated that no claim was made that the samples of No. 2 keeri lac sent by the plaintiff to the defendant were actual samples from the lot or lots to be sold, but that the samples were furnished by the plaintiff to the defendant for the purpose of informing the defendant of the nature and quality of the particular merchandise which the plaintiff was offering the defendant under the designation of No. 2 keeri lac, and that the defendant was entitled to receive merchandise of substantially the same nature and quality."

The defendant asked the judge to rule (1) that on all the facts the plaintiff was not entitled to recover; (2) "For the purposes of this case, No. 2 keeri must be regarded as substantially the same as the sample sent by the plaintiff to defendant"; (3) "The defendant is not bound by a special understanding of the meaning of a sale by sample contrary to or at variance with the general understanding of a sale by sample in mercantile transactions, unless knowledge of the special understanding in a particular trade is brought home to him"; (4) "The plaintiff is bound by sending of sample as No. 2 keeri to offer substantially equivalent goods in fulfilment and is estopped to show that anything of lesser value was regarded in the trade as No. 2 keeri"; (6) "If both the plaintiff and the defendant were ignorant of the trade understanding of the nature of No. 2 keeri, the sample sent by plaintiff was agreed upon by them to represent No. 2 and the plaintiff was bound to furnish goods substantially similar in components and proportions."

The judge filed the following memorandum: "I refuse to rule as above requested for the reason that I find as a fact, on all the evidence, that the goods were not sold by sample, but the so called sample sent by the plaintiff to the defendant was simply intended to represent the general character of No. 2 keeri"; and found for the plaintiff. The defendant alleged exceptions.

W. C. Gray, for the defendant.

J. M. Morton, Jr., for the plaintiff.

BRALEY, J. The sales were of two kinds of refuse gum, or

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shellac, which were to be used by the defendant in the manufacture of shellac varnish, but, not being carried in stock, they were to be purchased by the plaintiff and shipped to the buyer.

Having been sued for a breach of both contracts, the defendant contends as to the number two refuse, that it was sold by sample with an implied warranty that the bulk of the purchase should equal the sample not only in kind, but in quality, and that, the warranty having been broken, the plaintiff cannot recover. But the contracts, which, after verbal negotiations and letters between the parties were reduced to writing, having contained on the face of the writing no reference to such a stipulation, the goods must be deemed to have been sold only by description. *Weston* v. *Barnicoat*, 175 Mass. 454. Yet if no fixed standard as to the proportion, or uniformity of the ingredients of which they were composed appears to have been known to the trade, and the judge upon ample evidence found specifically that the specimen which the plaintiff sent to the defendant was not intended to represent a portion of the whole, but was only indicative of the general character of the article, the defendant was entitled to assume that when shipped the goods would be of the kind designated. *Fullam* v. *Wright & Colton Wire Cloth Co.* 196 Mass. 474, 476. *Putnam-Hooker Co.* v. *Hewins*, 204 Mass. 426, 430.

If as to the other purchase, the defendant had the right before acceptance to a reasonable opportunity of examination, he did not avail himself of it when notified by the plaintiff of the arrival of the No. 1 keeri lac, with the request that he make a "dock examination" before delivery to the carrier, which by the terms of the contract would have passed title. Instead of making an inspection the defendant asked the plaintiff to act for him, and to draw and forward samples, but upon their receipt he refused to accept, claiming that the merchandise was not of the quality bought. The good faith of the plaintiff, and that the samples selected were fairly representative of the whole lot does not seem to have been questioned, and if their analysis as the defendant's chemist testified disclosed an unusually large percentage of rosin, yet the decisive question of fact common to both transactions was, whether the goods which were delivered and returned and those which were tendered and refused, conformed to the terms of sale. The judge's finding in favor of the

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plaintiff having been warranted by the evidence is conclusive upon this point, and the defendant's requests were rightly denied. *American Malting Co.* v. *Souther Brewing Co.* 194 Mass. 89.

Exceptions overruled.

FRANCES S. CLARKE, executrix, *vs.* INHABITANTS OF ANDOVER & others.

DOMESTIC AND FOREIGN MISSIONARY SOCIETY OF THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA & others *vs.* ATTORNEY GENERAL & another.*

Essex. November 1, 1910. — November 22, 1910.

Present: KNOWLTON, C. J., HAMMOND, LORING, SHELDON, & RUGG, JJ.

Devise and Legacy, What estate, Contingent remainder, "Or" construed to mean "and," Designation of legatee. *Trust. Executor and Administrator. Probate Court*, Jurisdiction. *Judgment. Equity Jurisdiction*, Bill for instructions. *Words*, "Or," "And."

A will contained the following provision: "I give to S. my adopted daughter the sum of $10,000; and to E., also my adopted daughter, $7,000; the income of which if not needed for their support, and schooling to be added to the principal during their minority; and at the age of twenty-one they to receive the income of the several amounts devised to them during the remainder of their lives; and sooner, if married before the age of twenty-one, at the time of said marriage; in case of the death of either of them before they come of age or are married, the said sum or sums to be appropriated for the establishment of an asylum in Andover for the benefit of orphans & indigent children under the direction of my trustees or executors; and in case of their death or the death of either of them, leaving children, the said amount to go to the said children." There were numerous legacies to relatives and friends of the testator, and residuary clauses disposing of all of his estate not otherwise disposed of. E. died when more than twenty-one years of age, never having married. *Held*, that by the will E. received only a right to income during her life, and in no event an absolute estate in any portion of the principal.

A will contained the following provision: "I give to S. my adopted daughter the sum of $10,000; and to E., also my adopted daughter, $7,000; the income of which if not needed for their support, and schooling to be added to the principal during their minority; and at the age of twenty-one they to receive the income of the several amounts devised to them during the remainder of their lives; and sooner, if married before the age of twenty-one, at the time of said marriage; in case of the death of either of them before they come of age or are married,

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* The two cases were reserved for determination by the full court by *Morton*, J.

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the said sum or sums to be appropriated for the establishment of an asylum in Andover for the benefit of orphans & indigent children under the direction of my trustees or executors; and in case of their death or the death of either of them, leaving children, the said amount to go to the said children." There were numerous legacies to relatives and friends of the testator, and residuary clauses disposing of all his estate not otherwise disposed of. E. died when more than twenty-one years of age, never having married, S. in the meantime having died leaving children. *Held*, that the sums given in trust for E. and S. were to be disposed of independently of each other, and that the children of S. had no interest in the sum left in trust for E. and her children if she had any.

A will contained the following provision: "I give to S. my adopted daughter the sum of $10,000; and to E., also my adopted daughter, $7,000; the income of which if not needed for their support, and schooling to be added to the principal during their minority; and at the age of twenty-one they to receive the income of the several amounts devised to them during the remainder of their lives; and sooner, if married before the age of twenty-one, at the time of said marriage; in case of the death of either of them before they come of age or are married, the said sum or sums to be appropriated for the establishment of an asylum in Andover for the benefit of orphans & indigent children under the direction of my trustees or executors; and in case of their death or the death of either of them, leaving children, the said amount to go to the said children." There were numerous legacies to relatives and friends of the testator, and residuary clauses disposing of all his estate not otherwise disposed of. E. died when more than twenty-one years of age, never having married. The trustees and executors named in the will were neighbors and personal friends of the testator. *Held*, that the words "in case of the death of either of them before they come of age or are married," should be construed to mean "in case of the death of either of them both before they become of age and before they are married," so that, E. having reached twenty-one years of age before her death, although she never married, the remainder for the establishment of an asylum in Andover never took effect.

A will contained a second clause, which set apart $7,000, the income of which was to be paid to the testator's adopted daughter, but made no provision for the disposition of the principal in case the adopted daughter died without ever having married and more than twenty-one years of age. A sixth clause of the will gave "the residue of" the property, "not exceeding $50,000," to a certain school, and the seventh clause provided, "If there should anything remain after satisfying the bequests before made, I order it divided" among certain institutions. The adopted daughter died when more than twenty-one years of age without ever having married. The $50,000 for the school had been provided for before her death. *Held*, that the sixth and the seventh clauses together constituted a general residuary clause, which included all property not effectually disposed of by the earlier parts of the will; and that the $7,000 in question passed to the institutions mentioned in the seventh clause.

A will left certain property to be divided "in equal parts, between the Foreign board of missions of the Episcopal church, the Domestic board of the same," and three other societies and corporations. The Foreign board of missions of the Episcopal church and the Domestic board of missions of that church are different departments under the charge of different committees as official managers of a corporation named the Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America. Each of the committees has separate offices and separate treasuries and makes separate appeals to

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the church, and each conducts its own affairs quite independently of the other. *Held*, that the corporation, the Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America, should receive two fifths of the amount to be divided, and each of the other three societies and corporations should receive one fifth.

A trustee under a will, who held a trust fund for the purpose of paying the income thereof to a certain beneficiary during his life and thereafter to distribute it among certain societies and corporations, died after the life beneficiary without having distributed the principal. A successor was appointed, who died without having taken possession of the fund. Thereafter the Probate Court by a decree, which, upon petition by one of the ultimate beneficiaries under the will, this court held should be vacated because of lack of notice to certain parties, undertook to appoint a succeeding trustee. The executor of the will of the trustee who last had possession of the trust fund sought by a bill in equity instructions as to what disposition he should make of the fund, and this court, having determined the questions of construction of the will which were raised by the parties, directed such executor to distribute the fund accordingly, and *held*, that there was no occasion for the appointment of another trustee.

By the provisions of a will a certain fund was given to a trustee, the income to be paid to an adopted daughter of the testator for her life, and the principal after the beneficiary's death to be distributed among certain societies and corporations. After the death of the beneficiary, the trustee died without having distributed the fund, and thereupon without notice to the societies and corporations interested, but with notice only to the Attorney General of the Commonwealth and to a town which in a contingency that did not occur might have been interested, the Probate Court appointed a trustee to take over the fund from the executor of the will of the deceased trustee. One of the corporations entitled to the fund petitioned that the decree of appointment be vacated, and the executor of the deceased trustee filed a bill in equity for instructions as to the distribution of the fund. *Held*, that the decree of appointment, having been made without the notice to all persons interested required by R. L. c. 147, § 5, was made without authority and should be vacated, and *also*, that, because an order would go from this court to the Probate Court vacating the decree appointing the trustee at the same time with the order upon the bill for instructions, a decision could be made upon the bill for instructions in the same way as if there had been no attempted appointment of a new trustee, and that the executor of the deceased trustee, without a new trustee being appointed by the Probate Court, might distribute the trust fund in accordance with instructions given him.

Under St. 1891, c. 415, § 4, now incorporated in substance in R. L. c. 162, § 2, providing that "the probate courts shall be courts of superior and general jurisdiction with reference to all cases and matters in which they have jurisdiction," an erroneous decree of a probate court made in such a case stands until it is vacated or changed by that court.

KNOWLTON, C. J. Benjamin H. Punchard, late of Andover, deceased,* after giving devises and legacies to his wife, provided in the second clause of his will as follows: "I give to Sarah Elizabeth my adopted daughter the sum of ten thousand dollars; and to Ellen, also my adopted daughter, seven thousand dollars;

* The testator died in Andover in 1850.

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the income of which if not needed for their support, and schooling to be added to the principal during their minority; and at the age of twenty-one they to receive the income of the several amounts devised to them during the remainder of their lives; and sooner, if married before the age of twenty-one, at the time of said marriage; in case of the death of either of them before they come of age or are married, the said sum or sums to be appropriated for the establishment of an asylum in Andover for the benefit of orphans & indigent children under the direction of my trustees or executors; and in case of their death or the death of either of them, leaving children, the said amount to go to the said children." In the third, fourth and fifth clauses he gave numerous legacies to relatives and friends and charitable corporations, and he began the sixth clause with these words: "The residue of my property, not exceeding fifty thousand dollars, I give and bequeath to the town of Andover for the purpose of founding a free school." Then follow directions in regard to the establishment and maintenance of this school, which are not material to the present case. The seventh clause is as follows: "If there should anything remain after satisfying the bequests before made, I order it divided in equal parts, between the Foreign board of missions of the Episcopal church, the Domestic board of the same, the American Bible Society, the American Sunday School Union, and the Seaman's Friend Society incorporated by the Legislature of New York in 1833."

The testator's adopted daughter Ellen died in 1892, never having married and being much more than twenty-one years of age. Her legacy has been in the hands of trustees, and the first of these cases is a bill brought by the executrix of the will of Amasa Clarke, who was the last survivor of the trustees who had the property in possession,* for instructions in regard to the disposition of the money which has come into her hands as his representative. The town of Andover, the corporations mentioned in the seventh clause, Maria Parker, an heir at law of Benjamin H. Punchard, the children of Sarah Elizabeth Punchard, and

* Amasa Clarke was appointed trustee on September 28, 1885, and died on October 26, 1907. One George A. Parker was appointed as trustee in his place on April 21, 1908, but died on August 19, 1908, without having taken possession of the trust fund. Ellen Punchard died on February 18, 1892.

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Harry M. Eames who was appointed by the Probate Court as a trustee to succeed the latest deceased trustee, have been made parties defendant.

The interest of the adopted daughter Ellen in the $7,000 was only a life estate, with a creation of certain contingent remainders over. It was not an ownership in fee with an attempt to control the subsequent use and disposition of it by an inconsistent and void provision interfering with the rights of the owner. The whole language is to be construed together to ascertain the meaning of the testator, and it is plain that in no event was the daughter to have anything more than the income for life. The remainder over was to go as prescribed, upon the happening of one or the other of certain contingencies, and if neither of them happened it was left undisposed of. *Wynn* v. *Bartlett*, 167 Mass. 292. *Ware* v. *Minot*, 202 Mass. 512. *Dow* v. *Abbott*, 197 Mass. 283. *Stearns* v. *Stearns*, 192 Mass. 144. *Loomis* v. *Gorham*, 186 Mass. 444.

The moneys given to the adopted daughters were separate funds, and no cross-remainders were created. Each was to be disposed of independently of the other. While the same methods of disposition are prescribed for each, the takers of a remainder upon the happening of a contingency, take only under the language applicable to the separate fund, and not by reason of any relation of the funds to each other. The children of Sarah Elizabeth Punchard have no interest in this fund.

The question most discussed is whether, to give the remainder effect for the establishment of an asylum in Andover, the death of Ellen must occur before the happening of either of the events referred to, whichever might happen first, namely, her coming of age, or her marriage, so that the happening of either before her death would defeat the remainder without the happening of the other before her death, or, whether the remainder would vest on her death unless she had both come of age and been married before that time. We are of opinion that it was only in case her death before either event happened that this remainder was to take effect, so that if she came of age or was married before her death the money was not to be appropriated to this charitable use. Provision was made for the payment of the income directly to the life tenant on her arrival at the age of twenty-

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one years, or on her marriage before reaching that age. The happening of either event fixed the right to receive the payments of the income. Then followed the language in question, that in case of death before the happening of one or the other of these events, whichever happened first, the remainder was to go over in the manner stated. This was, in substance, that in case of her death before the income became payable to her by reason of the happening of one of these events, the remainder was to go over. This disposition of the remainder evidently had reference to the use of it in case she needed the income only for a short time for her support or education, not to the founding of an asylum after her death unmarried in extreme old age, when conditions in the neighborhood might have entirely changed. The asylum, too, is to be established under the direction of the testator's trustees or executors. These were his neighbors and personal friends, and seemingly he expected the asylum to be established by them personally, soon after his death, if there was occasion to establish it at all. If, as is contended by the defendant Eames and the town of Andover, the remainder over would take effect unless the death of the legatee occurred after reaching the age of twenty-one years, and also after having married, she might marry and die leaving children before arriving at that age, in which case, *ex hypothesi*, the remainder would be appropriated for the establishment of the asylum. But this result would be contrary to the other provision, that upon her death leaving children the amount should go to them.

A construction like that which we adopt has been put upon similar language in many cases, both in this Commonwealth and elsewhere, and it has often been held that the word "or" will be construed to mean "and" when this seems necessary to give effect to the meaning of the testator. *Carpenter* v. *Heard*, 14 Pick. 449. *Hunt* v. *Hunt*, 11 Met. 88. *Parker* v. *Parker*, 5 Met. 134. *Barker* v. *Suretees*, 2 Stra. 1175. *Miles* v. *Dyer*, 5 Sim. 435. *Thackeray* v. *Hampson*, 2 Sim. & Stu. 214. *Weddell* v. *Mundy*, 6 Ves. 341. *Hasker* v. *Sutton*, 1 Bing. 500.

As the contingency on which the remainder would vest has not happened, the amount was not disposed of, unless by the residuary clause of the will. The sixth clause assumes to deal with all the residue, but appropriates only $50,000 of it if the amount

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should exceed that sum. The amount is more than that, and we come to the seventh clause, which disposes of anything that might remain after satisfying all the previous bequests. These two clauses together constitute a general residuary clause, which includes lapsed legacies and all property not effectually disposed of by earlier parts of the will. *Thayer* v. *Wellington*, 9 Allen, 283. *Wynn* v. *Bartlett*, 167 Mass. 292. *Gill* v. *Attorney General*, 197 Mass. 232. It follows that the fund in the hands of the plaintiff is to be divided in accordance with the provisions of the seventh clause of the will.

It appears that the Foreign board of missions of the Episcopal church and the Domestic board of the same are different departments, under the charge of different committees as official managers of the Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America, a corporation. "Each of these committees, during the period mentioned, had separate offices and separate treasuries, and made separate appeals to the church, and each conducted its own affairs quite independent of the other. . . . Each committee had its own books and offices and clerks, and elected its own separate secretaries and treasurers and other officers, and for many years the offices of the two committees were in different buildings." Each of these organizations is entitled to receive the same share of the fund under the residuary clause as each of the three corporations mentioned in that clause; and as each of them was maintained as an agency in the work of the Domestic and Foreign Missionary Society and was owned and controlled by this corporation, it follows that this corporation should receive two fifths of the amount to be divided, and that each of the other corporations should receive one fifth.

The other case is an appeal from a decree of the Probate Court dismissing a petition to vacate the decree appointing Harry M. Eames a trustee under the will of Benjamin H. Punchard, to receive the money in the hands of Frances S. Clarke, executrix of the will of Amasa Clarke, a former trustee. It appears that the appointment was made without notice to any of the parties who are now found to be interested in the fund, notice having been given only to the Attorney General and the officers of the town of Andover. The statute applicable to such cases re-

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quires that notice of the proceedings for the appointment shall be given to all persons interested. R. L. c. 147, § 5. *Shaw* v. *Paine*, 12 Allen, 298. The decree of appointment was made without authority, and the petition to vacate it should have been granted. *Gale* v. *Nickerson*, 144 Mass. 415. *Crocker* v. *Crocker*, 198 Mass. 401. *Phillips* v. *Chase*, 201 Mass. 444. Since the Probate Court is now a court of superior and general jurisdiction, (St. 1891, c. 415, § 4, R. L. c. 162, § 2,) the irregular appointment of Mr. Eames as a trustee must be corrected in that court and previous decisions to the contrary are no longer applicable. As an order upon the petition will go from this court vacating the decree of appointment at the same time with the order for a decree upon the bill for instructions, a decision can be made in the first case, in the same way as if the appointment had not been made. There is no occasion for the appointment of another trustee, but the money can be finally disposed of under a decree in this suit.

In the first case there will be a decree for the distribution of the fund among the parties mentioned in the seventh clause of the will, and in the second case there must be a decree for the petitioner.

So ordered.

H. Wheeler, for the plaintiff, stated the case.

D. Malone, Attorney General, & *F. T. Field*, Assistant Attorney General, for the Attorney General, submitted a brief.

H. S. Davis, for the Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America and the American Bible Society.

W. I. Nottage, for the American Seaman's Friend Society.

L. W. Cleaveland (of Connecticut), for the American Sunday School Union.

W. Rand, for Maria Parker.

A. F. Converse, for the town of Andover and Harry M. Eames, trustee.

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KATHERINE J. SHEEHAN *vs.* HAZEN B. GOODRICH & another.

Essex. November 2, 1910. — November 22, 1910.

Present: KNOWLTON, C. J., HAMMOND, LORING, SHELDON, & RUGG, JJ.

Negligence, Employer's liability.

At the trial of an action by a girl twenty years of age against her employer to recover for injuries caused by the breaking of a needle on a machine, which the plaintiff was operating, for sewing buttons on shoes, it appeared that the machine was similar to an ordinary sewing machine except that there was attached to its top a can, connecting by a chute with the needle, for feeding buttons in proper positon to the needle automatically. The plaintiff testified that she had worked upon the machine about a month, after having been shown how to operate it by an employee of the manufacturer of the machine, that she knew needles would break easily, and that they sometimes had broken when she pulled the thread down; that four days before the accident the automatic button feed did not work properly, and a representative of the manufacturer of the machine had repaired it, after which it worked properly during the remainder of that day, that the machine was not operated again until the morning of the accident when "the buttons seemed to come down in the foot, and the foot held," the needle broke, and the plaintiff was injured. *Held*, that there was no evidence which would have warranted a finding that the breaking of the needle was caused by a defect in the machine, since the cause of the accident was left a matter of conjecture and speculation, nor was there evidence of a negligent failure of the defendant to warn or to instruct the plaintiff, nor of negligence of a superintendent of the defendant.

TORT for personal injuries received through a needle breaking and flying into the plaintiff's eye while she, a girl twenty years of age, was at work upon a machine for sewing buttons on shoes in the defendant's shoe factory, the declaration containing two counts at common law, one alleging negligence in furnishing the plaintiff with unsafe, dangerous and defective tools and machinery to work with and a second alleging negligence in failing to warn or instruct her of dangers attending her work, and two counts under R. L. c. 106, § 71, cl. 1, 2, alleging as causes of the plaintiff's injury defective ways, works or machinery of the defendant and negligence of a superintendent. Writ dated August 2, 1906.

In the Superior Court the case was tried before *De Courcy*, J. At the close of the plaintiff's evidence the presiding judge ordered

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a verdict for the defendant and reported the case for determination by this court. The facts are stated in the opinion.

E. S. Abbott, for the plaintiff.

W. H. Hitchcock, for the defendants.

RUGG, J. This is an action of tort to recover for personal injuries received by the plaintiff while in the employ of the defendant, through the breaking of a needle on a machine used for sewing buttons on shoes. The machine was similar to an ordinary sewing machine, except that there was attached to its top a can connected by a chute with the needle. This device was for the purpose of automatically feeding the buttons down to the needle in such a position that the needle would pass through the eye of the button and thus fasten it to the shoe. The plaintiff was twenty years old, and had worked upon the machine about a month in all before the accident. Before running the machine she was shown how to operate it by an agent of the manufacturer of the machine. Four days before the accident, because the buttons did not come down to the needle, a representative of the manufacturer of the machine fixed it, and it worked all right during the remainder of that day. The machine was not operated again until the morning of the accident, when as the plaintiff testified "the buttons seemed to come down in the foot, and the foot held," the needle broke, and the plaintiff was injured. The plaintiff testified that she had never seen a needle break in that way before, although she knew they would break easily, and sometimes, when she pulled the thread down, the needle would snap right off. It is matter of common knowledge that sewing needles used upon machines and by hand not infrequently break, and of this the plaintiff testified that she was aware.

While the plaintiff in a case of this sort is not bound to exclude every other theory as to the cause of the injury, except such as is directly attributable to the defendant's fault, he must show some connection between it and a wrongful act of the defendant, and not leave it to surmise, conjecture and speculation. When according to common experience the cause may be as reasonably ascribed to a condition for which the defendant is not reponsible as to one for which he is, then the plaintiff is not entitled to recover. *Graham* v. *Badger*, 164 Mass. 42, 47. *Childs* v. *American Express Co.* 197 Mass. 337. *Ryan* v. *Fall*

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River Iron Works Co. 200 Mass. 188. Although a part of the machine was out of order on the last working day before the injury, this did not then cause the needle to break, nor so far as appears affect it in any way. That difficulty was repaired, and the machine continued to operate properly during the remainder of that day. There is no evidence to indicate what caused the breaking of the needle. It was likely to break easily without apparent cause or from being inserted unevenly or from striking a foreign substance, or from other reasons that might be suggested wholly disconnected with the failure of the chute conveying the buttons to work properly.

There was no evidence of negligence in failing to instruct the plaintiff as to the operation of the machine or to warn her of its danger. From her cross-examination it appears that she was familiar with the putting in of the needle and with the ordinary working of the machine, and the record is bare of anything to show that a more complete mechanical knowledge of it would have prevented the accident. The operation of the machine was simple, and her original instruction by the agent of the manufacturer of the machine together with her experience gave her all the knowledge necessary for the performance of her duty. There is nothing to show that any warning or instruction could reasonably have been given to the plaintiff which would have prevented the injury. Under such circumstances there is no duty resting on the employer to give instructions. *Whalen* v. *Rosnosky*, 195 Mass. 545. *Healy* v. *Gilchrist Co.* 205 Mass. 393.

The superintendent does not appear to have been in any respect negligent. The moment his attention was called to the irregular operation of the machine four days before the accident he caused it to be remedied, so that the machine worked perfectly. No connection is shown between this circumstance and the accident.

Judgment for the defendants.

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FLORENCE DRISCOLL *vs.* JOHN A. GAFFEY.
CATHERINE A. DRISCOLL *vs.* SAME.

Essex. November 2, 1910. — November 22, 1910.

Present: KNOWLTON, C. J., HAMMOND, LORING, SHELDON, & RUGG, JJ.

Negligence, In blasting, *Res ipsa loquitur*. *Evidence*, Presumptions and burden of proof. *Actionable Tort*. *Practice, Civil*, Judge's charge. *Husband and Wife*. *Nuisance*.

At the trial of an action of tort for personal injuries alleged to have been caused by negligence of the defendant's servants in blasting rock, there was evidence that the rock being blasted was seven hundred and fifty feet from the plaintiff's house, and that there was no covering put over the rock at the time of a certain blast that was described by a witness as a "great explosion which shook the barn," and which threw a piece of rock weighing twenty pounds into the plaintiff's house, causing the injuries to the plaintiff. *Held*, that the question whether the servants of the defendant were negligent was for the jury.

Where, at the trial of an action of tort for personal injuries alleged to have been caused by negligence of the defendant's servants in blasting rock, there was evidence of such negligence in the blasting besides the mere fact of a rock being hurled seven hundred and fifty feet into the plaintiff's house, and the presiding judge in his charge told the jury that the burden of proving such negligence was upon the plaintiff, and that upon the question of negligence they were not to take into account the results of the blast, but on the contrary were to judge of the negligence by the situation just before the blast, it was *held*, that the defendant had no ground for a contention that the jury were allowed to find for the plaintiff by an application of the doctrine of *res ipsa loquitur*.

At the trial of an action of tort by a woman for personal injuries, it appeared that through negligence of the defendant in blasting rock a large piece of rock was hurled seven hundred and fifty feet into the plaintiff's house, and a question was whether the defendant was exempt from liability because the plaintiff's injuries were merely from fright, terror, alarm, anxiety or distress of mind, unaccompanied by any injury to the person from without. The plaintiff testified in direct examination that she had left her pantry to go to a closet and was just coming from the closet when it seemed that she was thrown over on the floor, that the closet door hit her, but that she did not think it was the force of the door that threw her, that it seemed as if the house was falling in, that immediately afterward she went into the kitchen, saw everything upset, everything thrown around the closet, the sink and the stove, that she did not know that there was any rock there until her son found it, and that there were no marks on her body from contact with anything. On cross-examination she testified that she "could not say positively whether the door hit" her or not. The plaintiff's attending physician testified in substance that he saw her the next day, that "her condition was one of nervous shock," that he "called the trouble neurasthenia . . . what the ordinary layman would call a nervous breakdown from the shock," that "the fright she sustained . . . was an adequate cause for this injury, and the nervous shock was due to fright, and so the nervous shock is the cause that I attribute to the condition, and the only cause."

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Held, that, in spite of the physician's testimony, the jury might have found that the plaintiff was violently thrown to the floor either by being struck by the closet door or in some other way due to the blast, that consequently there was a battery to her person, to which at least some of her physical troubles were in part attributable, and therefore that it was proper to refuse to rule that the action could not be maintained.

The rule that, in actions of tort for personal injuries, where it is proved that the defendant has been negligent, there nevertheless can be no recovery by the plaintiff if the negligence, without inflicting upon the plaintiff any injury "from without," causes only fright, terror, alarm, anxiety or distress of mind, is an arbitrary exception, based upon a notion of what is practicable, to the general rule allowing recovery for damages caused by negligence; and therefore a charge to the jury, before whom was being tried an action where the physical injury to the plaintiff "from without" was so slight as to leave no mark or bruise, in which it was stated in substance that it would be sufficient if the injury caused by the battery was very slight, is not objectionable because, where the injury from without is appreciable even although it be very slight, the general rule applies and the exception does not.

It is a presumption of fact that, in the absence of anything to the contrary, a husband is liable to pay a reasonable compensation to a physician who has attended his wife professionally for over a year, and, where it appears that the attendance was due to injuries caused by negligence of a third person which gave the wife a right of action against the negligent person, the husband also has a right of action against such person for the amount for which he is liable to the physician.

Where during certain blasting operations a large piece of rock is hurled through the air and into a house, causing a door to strike a woman and injure her, *whether* such woman has a right of action in tort against the person doing the blasting without proof of negligence, here was not decided, the case having been tried on the theory, adopted by the parties and by the presiding judge, that the gist of the action was negligence on the part of the defendant.

HAMMOND, J. In the second of these two cases, which were tried together, the wife sues for compensation for injuries received through the negligent blasting of a ledge by the defendant, and in the first the husband sues to recover expenses incurred by him in the medical treatment and care of his wife on account of such injuries. In each case the jury found for the plaintiff; and both cases are before us upon the defendant's exceptions to the refusal of the presiding judge * to give certain rulings requested by him, and to a certain part of the charge. The case of the wife will be first considered.

It is strongly urged by the defendant that there was no evidence of negligence in the method of blasting. But we think that the question whether the charge was covered or otherwise

* *Lawton*, J.

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properly protected, and whether, if it had been, the rock would have been hurled to the plaintiff's house, were for the jury.* Much of the defendant's brief is devoted to a discussion of the doctrine of *res ipsa loquitur;* and it is contended that the doctrine is not applicable to the circumstances of this case. We do not find upon the record that the presiding judge said it was. On the contrary, after speaking of the various respects in which the plaintiff charged negligence of the defendant, he proceeds in his charge as follows: "You are to bear in mind — I again repeat it — that it is not . . . simply [for her] to say, why, here is a rock thrown, and we do not generally expect rocks to be thrown from a blast into a person's house, and now it is for the defendant to show that he was in the exercise of due care. . . . That is not the rule here. The throwing of the stone is conceded. The burden is upon the plaintiff to show you that the defendant was negligent in some of these ways or in all of them, that she, the plaintiff, has suggested. And in considering that question I again say to you you are not to take into account the results. You are in your mind's eye to go there on to the premises before anything is done, before any accident has happened, you are to look over the situation there, you are to take into account what people of prudence engaged in this sort of business should do, and you are to say whether in all respects these people did do the things which persons in that situation, having regard to the surroundings the possibilities of an accident, — you are to say whether these people did all that a person ought to have been expected to do under the circumstances. And if you have any doubt as to whether the defendant did do all the things that he ought to have done under the circumstances there in the way of conducting that blast, if you have any doubt about it, you are to bear in mind that the burden is upon the plaintiff to satisfy you that he did not do it, and not upon him to satisfy you that he did do it."

* There was evidence that the distance from the ledge that was being blasted to the plaintiff's house was seven hundred and fifty feet, that there was no covering on the ledge at the time of the blast, that the blast was "a great explosion which shook the barn," and that the rock which was hurled into the plaintiff's house weighed twenty pounds.

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Here in plain language the jury were told that the burden of proving negligence of the defendant was upon the plaintiff, and that upon this question of negligence they were not to take into account the results of the blast, but on the contrary were to judge of the negligence by the situation just before the blast. This *ex vi termini* excludes the doctrine of *res ipsa loquitur*.

It is next urged by the defendant that there was no evidence of physical injury, but that on the contrary the illness of the plaintiff was due solely to fright. If that is so, then there can be no recovery. The law upon this subject is well settled in this State. "We remain satisfied with the rule that there can be no recovery for fright, terror, alarm, anxiety, or distress of mind, if these are unaccompanied by some physical injury; and if this rule is to stand, we think it should also be held that there can be no recovery for such physical injuries as may be caused solely by such mental disturbance, where there is no injury to the person from without." Allen, J., in *Spade* v. *Lynn & Boston Railroad*, 168 Mass. 285, 290. As said by Holmes, C. J., in *Homans* v. *Boston Elevated Railway*, 180 Mass. 456, 457, the exemption from damages of this kind "is an arbitrary exception, based upon a notion of what is practicable." Where, however, the fright or mental disturbance is accompanied as a result of the same accident by physical injury "from without," then in the damages to be assessed there should be included not only those directly due to the injury from without but also those attributable to the mental shock or disturbance. And it is not necessary that the physical injury from without should be indicated upon the surface of the body by a bruise or otherwise. *Berard* v. *Boston & Albany Railroad*, 177 Mass. 179. *Steverman* v. *Boston Elevated Railway*, 205 Mass. 508, and cases cited. An internal injury caused by a blow from without is none the less an injury from the fact that it is wholly internal, or indeed from the fact that its true nature cannot be accurately diagnosed except by a *post mortem* examination.

As to the injury from without, the plaintiff testified as follows: "I had been to the pantry to get a light lunch for the children, had left there and had gone to the closet. I was just coming from there when it seemed that I was . . . [thrown] . . . over on the floor. The closet door hit me, but I don't think it

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was the force of the door that threw me. It seemed as if the house was falling in; that is all I can think of. There was a terrible crash and the house was falling. The next thing the little boy was picking me up. . . . Immediately after that I came into the kitchen, saw everything upset. . . . Everything was thrown around there, around the closet, around the sink, and around the stove. The curtain was in the middle of the floor. I didn't know there was any rock there until the little boy found it. Afterwards I went out on the piazza. There were no marks on my body from contact with anything on the day of this blast." On cross-examination she said: "I couldn't say positively whether the door hit me or not. I felt something hit me. It seemed as if I was caught and thrown. I didn't go down hard enough to get any bruises."

The plaintiff's son testified that at the time of the blast he was in the kitchen; that he heard the noise, but "didn't stop to see if the pantry door was open"; he "heard lots of dishes break," and found his "mother on the floor just a couple of seconds or so after the blast," and helped her up. The plaintiff's husband testified that he heard the explosion, went into the house and found his wife "all broken up and shaking." She was on her feet. Dr. Shatswell testified that he had attended the plaintiff at various times, and continued as follows: "Prior to the accident she was a remarkably well woman. My attention was called to her the next day [after the accident], namely, March 8th. Her condition was one of nervous shock. She was crying and wringing her hands. She was nervous and excitable. . . . She complained of headaches and backaches. . . . I called the trouble neurasthenia. It is what the ordinary layman would call a nervous breakdown from the shock." On cross-examination he said: "I treated her simply for nervousness. There was no mark of physical violence on her person. . . . She didn't complain of anything of the kind. When I said that the explosion was an adequate cause for this injury, I meant that the fright she sustained at the time was an adequate cause for the injury, and the nervous shock was due to fright, and so the nervous shock is the cause that I attribute to the condition, and the only cause."

Upon this evidence the defendant might reasonably have en-

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tertained a belief that the jury would adopt what seemed to be the view of the attending physician and conclude that the plaintiff suffered no physical injury from without, but that all her physical ailments were to be attributed solely to the mental shock. But they were not bound to take the physician's view. They might have thought that his attention was from the first attracted rather to what he regarded as the more serious and lasting effects of the accident than to comparatively insignificant injuries due to the fall upon the floor. They might have found that either by being struck by the closet door, or in some other way due to the blast, she was violently thrown to the floor, and that consequently there was a battery to her person, and that at least some of her physical troubles were in part attributable to this. The case was therefore properly submitted to the jury, and the first ruling requested * was properly refused.

In the charge to the jury it was stated in substance that it would be sufficient if the injury caused by the battery was very slight. To this the defendant excepted and now urges in support of the exception that the effect of such a rule is substantially to abrogate the general rule that where the injury is due solely to shock there can be no recovery. But it is to be borne in mind that this general rule is, as stated above, an exception, founded upon notions of practicability, to the more general rule of damages for which a negligent defendant is answerable. It is to be applied only where there is no injury from without. And we are of opinion that the more general rule applies where the injury from without is appreciable even although it be very slight. The criticism on this part of the charge is untenable.

As to the remaining rulings requested by the defendant, it is sufficient to say that so far as in accordance with the law they were in substance covered by the charge. Indeed the charge was apt, full and correct in law; its well chosen language was well calculated to help the jury to a clear understanding of the issues involved, and of the law. We see no error in the action of the court.

The case must be placed in the class of which *Berard* v. *Boston & Albany Railroad*, 177 Mass. 179, is a type.

* This was a ruling that on all the evidence the action could not be maintained.

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As to the first case, the defendant, in addition to the reasons given in the second case why a verdict should have been ordered for the defendant, urges one further consideration specially applicable to this case. It is argued by him that there is nothing to show that the plaintiff suffered any personal injury whatever, or that he was put to any expense for the care and nursing of his wife. But this position is untenable. It appears that a physician attended professionally the plaintiff's wife for more than a year; and no authorities need be cited to show that in the absence of anything to the contrary the presumption is that the physician is entitled to reasonable compensation, and that the plaintiff is answerable to him for it. And there is nothing in this case which necessarily overcomes this presumption. This case was also properly submitted to the jury.

This opinion has been written upon the theory propounded by the plaintiff and adopted by the court and defendant at the trial as the true theory, namely, that the gist of the plaintiff's action was negligence on the part of the defendant. Whether the action could have been maintained without showing such negligence we have not considered.

In each case the entry must be

Exceptions overruled.

R. Spring, (*G. E. Kimball* with him,) for the defendant.

D. N. Crowley, (*G. C. Donaldson* with him,) for the plaintiffs.

HARVEY R. FORD *vs.* SAM SHAPIRO.

SAME *vs.* ABRAHAM ZELIG.

Essex. November 2, 3, 1910. — November 22, 1910.

Present: KNOWLTON, C. J., HAMMOND, LORING, SHELDON, & RUGG, JJ.

Bills and Notes, Consideration, Validity. *Evidence*, Competency.

At the trial before a judge sitting without a jury of an action by the payee against an accommodation indorser of a negotiable promissory note, the defendant contended that the indorsement was illegal and void because it was procured by an abuse of criminal process and was given for the purpose of suppressing the prosecution of a crime. There was evidence tending to show that the plaintiff had given into the hands of a collection agency for collection a claim against a

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certain person for the amount of the purchase price of shoes, that on the advice of the attorney of the agency a complaint for larceny of the shoes was sworn out against the debtor, and that at the suggestion of the judge who was hearing the complaint that, if the debtor made restitution, he would *nol pros* the case, the debtor signed and the defendant indorsed the note in suit, and the plaintiff signed an acknowledgment of satisfaction, after which the court *nol prossed* the complaint. *Held*, that a finding for the plaintiff was warranted, since the judge might have found that the note was signed by the debtor, indorsed by the defendant and received by the plaintiff merely in settlement of a valid claim against the debtor and without any unlawful agreement having been made or unlawful pressure brought to bear by the plaintiff.

Evidence, offered at the trial of an action by the payee against an accommodation indorser of a negotiable promissory note, tending to show that the defendant was induced to indorse the note for the purpose of compounding a criminal prosecution then pending against the maker, in the absence of evidence tending to show that the plaintiff was responsible for such inducement, is immaterial as against the plaintiff and its exclusion does not harm the defendant.

TWO ACTIONS OF CONTRACT, each upon a promissory note signed by one Holtz and indorsed for accommodation, one note being indorsed by the defendant in the first case and the other by the defendant in the second case. Writs in the Central District Court of Northern Essex and in the Superior Court dated respectively December 17, 1908, and March 12, 1909.

In the Superior Court the cases were heard by *Bell*, J., without a jury. There was evidence tending to show that at one time Holtz had owed the plaintiff the amount of the purchase price of some shoes, that the plaintiff had given the claim to a collection agency to collect, that on the advice of the agency's attorney a complaint was sworn out charging Holtz with larceny, and that after the case had been partially heard, on the intimation of the judge that the case would be *nol prossed* if restitution were made, the attorney for Holtz and the attorney of the collection agency, who was conducting the prosecution, had a conference which resulted in the notes in suit being given and in the plaintiff signing a written acknowledgment of satisfaction. Thereafter the complaint was *nol prossed*.

There was some evidence from which an inference might have been drawn that the prosecution was initiated for the purpose of enforcing collection of the plaintiff's claim against Holtz.

Each of the defendants further offered to testify, as bearing upon the consideration for the giving of the respective notes and also their indorsements, that they knew that Holtz had been arrested and that he was out on bail at the time they indorsed the

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notes; that they thought that Holtz would go to jail unless a settlement was made; that Holtz told them at the time they indorsed the notes that if he could get these indorsements it had been arranged that the criminal prosecution would thereby be settled and dropped, but that unless he could get these indorsements he would go to jail; and that the defendants indorsed the notes relying upon the arrangement and for the purpose of settling and compounding the criminal prosecution and saving Holtz from going to jail. There was no evidence that the plaintiff was present at these conversations or that any knowledge of them ever was communicated to him.

At the close of the evidence, the defendant asked the presiding judge to rule and find in each action as follows:

"1. On all the evidence the plaintiff is not entitled to recover in this action.

"2. The note upon which this action is brought was given for the purpose of suppressing the prosecution of a crime, and the consideration thereof is illegal and void.

"3. The note upon which this action is brought was indorsed by the defendant for the purpose of suppressing the prosecution of a crime, and the consideration thereof is illegal and void.

"4. The note upon which this action is brought was obtained by abuse of criminal process, and the consideration thereof is illegal and void.

"5. The indorsement of the note upon which this action is brought was obtained by abuse of criminal process, and the consideration thereof is illegal and void."

The presiding judge refused to rule and find as requested, and found for the plaintiff in each action. The defendants alleged exceptions.

E. S. Abbott, for the defendants.

M. A. Cregg, for the plaintiff.

SHELDON, J. The defendants' argument in support of their requests for instructions rests upon the contention that it appeared at the trial that their indorsements were obtained and given for the suppression of the criminal prosecution which had been instituted against Holtz, and in consequence of the plaintiff's abuse of that criminal process. If the facts had been found to be as they contended, their contention would have been well

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founded. But the judge had a right upon the evidence to find, and it now must be taken that he did find, that Holtz gave the notes, the defendants respectively indorsed them, and the plaintiff received them, merely in settlement of his valid claim against Holtz and without any unlawful agreement having been made or unlawful pressure brought to bear by the plaintiff. Upon that finding, there was nothing in the transaction to prevent the plaintiff from recovering, and the instructions requested were rightly refused. *Jennings* v. *Law*, 199 Mass. 124.

The evidence offered and excluded was competent to show that the defendants made their indorsements in consequence of the unlawful inducements held out to them by Holtz; but it did not tend to show that the plaintiff was in any way responsible for those inducements. It could not have altered the finding of the plaintiff's innocence of any unlawful conduct. It was not material under what inducements the defendants acted unless the plaintiff was in some way responsible therefor. *Hudson* v. *Miles*, 185 Mass. 582, 586, 587. It follows that the defendants were not harmed by the exclusion of the evidence.

The exception taken by the defendant Shapiro as to the demand and notice was waived at the argument.

Exceptions overruled.

JOHN E. GREEN *vs.* FRED L. TARR.
SAME *vs.* WILLIAM H. NILES & others.

Essex. November 3, 1910. — November 22, 1910.

Present: KNOWLTON, C. J., HAMMOND, LORING, SHELDON, & RUGG, JJ.

Negligence, Due care of plaintiff.

In actions by a boy twenty years of age against his employer and the owner of the building in which he worked, for personal injuries incurred while he was transporting himself and another employee of the defendant to an upper story of the building upon a freight elevator, which he found unemployed and which the defendant's employees were accustomed to use for their own transportation when not otherwise in use, it appeared that the plaintiff's injury was caused by the catching of his heel, which must have projected over a strip of wood about two and a half inches wide and two and a half inches high bolted to the edge of the platform of the elevator, that the platform was about five feet square, that the plaintiff told his companion to stand in the middle of it and that he stood facing

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her a little way from her, that the plaintiff was relating to his companion his experience when he was at a theatre with a lot of other boys and a policeman took him by the arm and pulled him backward, and he testified that when he had reached this point in his story the accident happened. He also testified that a sudden jolt caused him to step backward to recover his balance and that the next thing that he remembered was that his foot was caught. It appeared that, whatever the vibration or jolting of the elevator was, it was something with which the plaintiff was perfectly familiar and that he knew the dangers which might result from this motion to a person who stood near the edge of the platform if he did not stand firmly, and in his testimony he failed to show that he was taking any care for his safety or giving any attention to his position upon the elevator in reference to putting his foot over the edge of the platform. The only person besides the plaintiff who saw the accident was his companion, who testified that the accident happened immediately after the plaintiff, in telling about the policeman, put up his hand and said, "Gee, but he gave me an awful rap," and that she did not notice whether his foot was on the joist or not or whether he had hold of anything. *Held*, that there was no evidence for the jury that the plaintiff was in the exercise of due care, and that a verdict properly was ordered for the defendant.

TWO ACTIONS OF TORT by the same plaintiff, one against his employer and the other against the owners of the factory building in Lynn in which the plaintiff was employed, for personal injuries sustained by him in October, 1903, when he was twenty years of age, while he was going from one floor to another on a freight elevator maintained in the factory building. Writs dated respectively January 16, 1904, and March 15, 1909.

In the Superior Court the cases were tried together before *Stevens*, J. At the close of the plaintiff's evidence, which is described in the opinion, the judge ordered a verdict for the defendant in each of the cases. The plaintiff alleged exceptions.

J. H. Sisk, (*R. L. Sisk & A. B. Tolman* with him,) for the plaintiff.

R. Spring, for the defendant in the first case.

W. H. Niles, for the defendants in the second case.

KNOWLTON, C. J. These are two actions, one against the plaintiff's employer and the other against the owners of the building where the plaintiff worked, to recover for an injury received by him while riding upon an elevator. The elevator was for the carriage of freight from the level of the street to the fifth floor and the intervening floors of the building. It was designed to take a load of three thousand pounds in addition to its own weight. Its rate of speed was from forty-five to fifty feet per minute. The platform was about five feet square. All these

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facts were put in evidence by the plaintiff and were undisputed. There was testimony that signs were posted, bearing these words: "Take notice. For freight only. All persons riding on this elevator do so at their own risk." There was evidence tending to show that, when the elevator was not otherwise in use, employees often rode upon it without objection. At each floor there was a hatchway or plank floor in two parts, so arranged that it was opened and shut automatically by the elevator as it passed up and down, each part being lifted and rolled back upon a track under the floor by the elevator as it came in contact with it, and then returned to its place by the force of gravity after the elevator had gone by. At the edge of the platform, on the two sides of the elevator where the tracks for the hatches were located, there was a strip of wood about two and one half inches wide and two and one half inches high, bolted through the floor, to prevent anything carried on the elevator from going over the edge of the platform.

The plaintiff was about twenty years of age. He had come down the stairs from the fifth story on an errand, and was going back, when he saw the elevator standing at the first floor. He got into it, and invited Mrs. Nicholson, an employee whom he saw coming to her work late, to ride up with him. When both were on the elevator, he started it. As he was passing the fourth floor the heel of his foot was over the edge of the platform outside of the strip of wood two and a half inches high, bolted through the floor of the platform, and it caught upon some part of the surrounding structure and was injured. He and Mrs. Nicholson were the only persons who saw the accident.

When asked in his direct examination to state what happened, the plaintiff said: "As near as I can think, a sudden jolt; the elevator was then at the fourth floor. . . . Well, I said jolt; just the same as in an electric car if it stops sudden. I tried to catch myself and in catching myself I caught my foot." To the question: "What happened to you when the jolt came?" he answered: "Well, the next I remember, my foot was caught." He also said: "When I stepped backwards to catch myself and the jolt occurred, the next I remember was my foot caught and I yelled, and after I passed the beam, I suppose it came out itself. . . . The car stopped automatically at the fifth floor. I jumped

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off the car. The car stopped even with the floor." He testified that he had ridden on the elevator a great many times during the months that he had worked there before the accident, and said that when he had ridden on it "it shook violently, but not as violently as it did the day I was hurt." Answering another question he said, "I meant that it shook strongly, as near as I can remember, all the time I was there." To the question: "Now then, what else did it do besides shaking strongly during the time you were there or any portion of the time?" he replied: "Well, it jolted and seemed to jolt sideways the day I got hurt. . . . On the day of the accident when it vibrated so strongly it did not shake me off my feet. It did not shake the position of my body that I remember of, so that in all the vibration that I have described there was not vibration enough to disturb my standing up without holding on to anything."

Mrs. Nicholson, called by the plaintiff, testified in part as follows: "Green told me to stand in the middle and he stood facing me, I do not know how far from the edge but a little way from me. There was a conversation. Green was standing right in front of me. I do not know where he stood in regard to the post. He was talking to me. I did not notice anything different from any other time I was on the elevator. There was no more vibration on this elevator than on any other one that I noticed. The first thing I knew I heard John pleading for me to stop the elevator, and I said, 'I don't know, what will I do?' and I began screaming, and after that I cannot tell. . . . I do not know just how he was caught. . . . The elevator went on up. I got out on the top floor."

In cross-examination she testified that Green was telling her something that happened to him with a lot of other boys in the Lynn Theatre, when a policeman on duty called out for them to move on, or something like that. She said, "I think Green did say 'Gee, but he gave me an awful rap.' The accident happened right after he said 'Gee, but he gave me an awful rap.' He put up his hand before the accident happened and that is my best recollection. The time he put his hand up was when he said 'Gee, but he gave me an awful rap.' . . . I did not notice whether his foot was up on the board joist or not. I stood all the time without supporting myself. I do not know whether

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my arms were folded or hanging at my side. I did not take hold of anything. I did not notice as he was talking that he had hold of anything. I stood firm. There was no more shaking or vibration than I noticed in other cars. I did not notice any vibration at all. . . . I did not notice that the elevator had slowed down or started up with a jerk. I do not know whether I would have noticed it if there had been a slow movement and then it had shot up fast. I did not notice anything of that kind."

In her testimony there is nothing to indicate that the plaintiff was free from negligence that contributed to the injury. If he can stand on this part of the case, it must be on his own testimony.

He testified that he knew there was danger if one got too near the edge of the platform, and that there was a risk of injury if one's foot got over the edge. The vibration or jolting of the elevator was something with which he was very familiar. Although he testified that it seemed greater that day than before, all the experts that he called testified to nothing in the condition of the elevator that could produce any irregularity, except a wearing of the gearing that might cause vibration. He testified that at the time of the accident "the elevator kind of wavered; it did not stop, it slowed down for a fraction of a minute. It never stopped permanently. I could not say how long the car travelled with the speed reduced. The elevator started up when it was going through the floors. I was not thrown when the elevator slowed down. I could not say whether the elevator travelled ten feet or twenty feet; I have no idea. . . . When I say it started faster I mean it went faster than when it was going slow. . . . It did not slow down so perceptibly that I noticed that the elevator was not acting as it was accustomed to act. It did not go slow enough to do that. It did not slow down but very little, — barely perceptible. . . . I do not remember whether I threw my hands out. I do not remember that my body was swung to and fro. I have not the slightest recollection to-day as to what motion was imparted to my body by the moving up of the elevator. I saw the young lady that I was telling my story to at that time. She was not thrown. I did not see any signs of movement of her body. The motion of the car after it slowed

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down was to increase its speed going up again. I cannot tell the jury how the speed, after the elevator slowed down, compared with the ordinary running of the car. I cannot give the jury the slightest idea. . . . At the time of the upward movement of the elevator, my left heel got over a piece of joist two inches high; I do not know where my heel caught. . . . I do not know where my right foot went. I have no recollection that it stirred from the position it was in. . . . I do not know how long the increased motion of the car lasted. I cannot describe any motion of my body which was imparted to me by the elevator at the time of the accident. I do not remember stepping backwards just before the accident. . . . When I had ridden on the elevator before it did make a rumbling noise and shake as it struck the hatches. As I remember it the accident happened just before the bottom of my car reached the level of the fourth floor, and as the car came up toward that fourth floor the top of it struck the hatches and that caused a little additional vibration. It always did every time I rode on it. I believe it always shook a little more when the top of the car struck the hatches."

At the time of the accident the plaintiff was still talking to Mrs. Nicholson of his experience with the policeman. He testified of the policeman: "'He did not strike me on the head; he took me by the arm; he pulled me backwards' and that is the point in my story I had reached when the accident happened as near as I can remember."

We are of opinion that the testimony of the plaintiff, whether taken by itself or in connection with testimony of Mrs. Nicholson, has no tendency to show that he was in the exercise of such care as was reasonably necessary in reference to keeping his feet from going beyond the edge of the platform. The vibration or jolting of the elevator, whatever it was, was something with which he was perfectly familiar. He well knew the dangers that might attend it to one who stood near the edge of the plaform, if he did not stand firmly. In his testimony he failed utterly to show that he was taking any care for his safety or giving any attention to his position upon the elevator, in reference to the possibility of putting his foot over the edge of the platform. If there is a possibility that he was using ordinary care, he offered no evidence to show the probability of it. We can hardly conjec-

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ture that the accident happened without contributory negligence on his part; much less can we find in his testimony that which tends to establish as a fact the proposition that he was in the exercise of reasonable care. The only reasonable explanation of the accident, upon his testimony and that of the other witness, is that he was not exercising such care as persons ordinarily would exercise in his place, with his experience upon the elevator. We are of opinion that he failed to introduce any evidence that would warrant the jury in finding that he was in the exercise of due care. In each case the entry must be

Exceptions overruled.

FLORENCE HAWKES *vs.* BROADWALK SHOE COMPANY.

Essex. November 8, 1910. — November 22, 1910.

Present: KNOWLTON, C. J., HAMMOND, LORING, SHELDON, & RUGG, JJ.

Negligence, Employer's liability.

The tenant of the second floor of a three story building, who maintains a factory there, is not liable to one of his employees who is injured by reason of slipping on an accumulation of ice and snow on the steps leading to the ground from a platform attached to the first floor of the building, the platform and the steps being under the control of the landlord and used in common by the tenants of the three floors of the building, although the steps afford the only way by which the employees of the tenant maintaining the factory on the second floor can enter or leave the building, because such steps are not a part of the ways or works of such tenant which under the employers' liability act he is bound to keep safe for the use of his employees, nor is he liable at common law to his employees for the condition of the steps.

TORT for personal injuries sustained by the plaintiff on January 19, 1909, while in the employ of the defendant. Writ in the Central District Court of Northern Essex dated February 9, 1909.

The declaration was in one count alleging that the plaintiff was injured by falling upon a certain flight of steps at the factory on River Street in Haverhill where the plaintiff was employed, by reason of a dangerous accumulation of ice and snow which the defendant negligently had failed to remove. The defendant filed a statement in writing waiving any defense it might have

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by reason of the contributory negligence or want of due care of the plaintiff, if it should be found that she was chargeable with any.

On appeal to the Superior Court the case was tried before *Hardy*, J., without a jury. The following facts were shown by the evidence:

The defendant was a tenant at will of the second floor of the three story building where the injuries occurred. The first and third floors were occupied by other tenants at will of the same landlord, and the tenant of the third floor had the right to use concurrently with the defendant an interior stairway leading down to a doorway opening upon the platform from which the steps on which the plaintiff fell led to the ground. The tenant of the first floor used the same platform and steps and a separate doorway from the first floor opening upon that platform. The only way furnished by the defendant to its employees for entering and leaving the building consisted of the outside platform and steps upon which the plaintiff fell and the interior stairway used by the defendant and the tenant of the third floor.

The steps were about ten in number, and the distance from the foot of the steps to the public sidewalk was about fifteen feet. The platform and steps were about eight feet wide, and the steps passed down by the front wall of the building, with a railing over the outer ends of the steps.

The landlord owed no duty to the defendant or its employees to remove ice and snow from the platform and steps, unless it owed such duty by reason of the fact that the defendant was a tenant at will of the landlord; there was no express or specific contract between the landlord and the defendant or the defendant's servants whereby the landlord engaged to remove ice and snow from the platform and steps.

The plaintiff received her alleged injuries on or about January 19, 1909, at about five o'clock in the afternoon, as she was leaving the building after her day's work. There was uncontradicted evidence tending to show that there was no roof or covering over the steps, that no light was kept on the building at or near the steps, that it was dark at the steps when the plaintiff fell, and that the cause of her falling was a hubbly and uneven layer of slippery ice and snow upon the steps. The

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plaintiff testified, without being contradicted, that the ice and snow had existed on the steps in the morning, and that it had not been removed or changed during the day. There was uncontradicted evidence showing that the plaintiff fell from the top of the steps to the bottom and thus sustained injuries.

At the close of the evidence the defendant asked the judge to rule that upon all the evidence the plaintiff was not entitled to recover. The plaintiff asked the judge to make the following ruling:

"1. If it is found that the defendant was one of two or more tenants at will or lessees of the building in question, each of whom occupied a separate floor of the three floors of the building, and that the owner or landlord himself occupied the first floor, which was about on the same level as the platform of the steps upon which the alleged injury occurred, and had a door opening upon said platform; that the defendant had become entitled by becoming a tenant to use said platform and steps as a way for its employees to pass into and out of said building, and had no other way for such use; [that neither the landlord nor any other tenant owed a duty to the defendant or to the defendant's employees to keep said platform and steps free from dangerous accumulations of ice and snow;*] that the defendant had the right to use in common with another tenant or tenants an interior stairway leading to a door opening upon said platform, and that they had no other way for their employees to go down from their respective floors; and that the landlord and the other tenants used said platform and steps for the going and coming of their employees, — said platform and steps were a part of the ways connected with and used in the business of the defendant, and the defendant owed the duty to the plaintiff, if she was in its employ, not to cause her personal injury, while she was in the exercise of due care, by reason of a defect in the condition of said platform or steps due to a dangerous accumulation of ice and snow, which arose from, or had not been discovered or remedied in consequence of, the negligence of the defendant or of a person in its service who had been entrusted by it with the duty of seeing that the ways were in proper condition."

* The part enclosed in brackets was contained in the ninth and tenth lines of the request as presented at the trial.

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The presiding judge found for the defendant, and filed this memorandum:

"In this case, tried by the court without a jury, I find for the defendant. I decline to give the ruling requested, with the modification that upon the evidence the landlord's duty to the defendant in the absence of an express agreement is one imposed by law if any exists, and I make no special finding of fact thereon as stated in the ninth and tenth lines of such request."

The plaintiff alleged exceptions to the refusal of the presiding judge "to rule as requested by the plaintiff in the plaintiff's written request numbered 1," and "to the ruling made by the judge at the request of the defendant that upon all the evidence the plaintiff is not entitled to recover." It was not stated in the bill of exceptions that the judge made such a ruling as matter of law.

E. E. Crawshaw, for the plaintiff.

J. G. Walsh, for the defendant.

KNOWLTON, C. J. This action is brought against the plaintiff's employer to recover for an injury received by falling upon a stairway which is alleged to have been slippery and dangerous from an accumulation of snow and ice upon it. The defendant occupied the second story of a three story building, as a tenant at will of the owner. The first and third stories were occupied by other tenants at will. The tenant of the third floor had a right to use, in common with the defendant, an interior stairway leading down to a doorway opening upon a platform outside of the building. From this platform steps, ten in number, led down to the ground at a point about fifteen feet distant from the public sidewalk, and these were used by all the tenants of the building. The platform and steps were about eight feet wide, and the steps passed down by the front wall of the building, with a railing running down to the ground over the outer ends of the steps. The only question in the case is whether these steps were a part of the ways or works of the defendant, which it was bound to keep safe for the use of the plaintiff.

The declaration is under the employers' liability act, and the argument is made under the provisions of that act and the analogous doctrines of the common law.

The legal relation of the defendant to the steps where the

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accident happened seems to be that, as the tenant of the second story of the building, it was given a right, in common with others, to pass over the way from the street and up the steps and over the platform and through the interior passageways to the premises occupied by it as a tenant, while the landlord retained the possession and control of the steps and other parts of the passageway, subject only to the rights of the tenants to pass over them. Under the decisions, we are of opinion that these steps were not a part of the defendant's ways or works, within the meaning of the employers' liability act. In *Coffee* v. *New York, New Haven, & Hartford Railroad*, 155 Mass. 21, 23, the court said that, by the language in the statute, "we understand something in the place, or means, appliances, or instrumentalities provided by the employer, for doing or carrying on the work which is to be done. The use of other words may not make the meaning clearer, but it would seem that there must be a defect in something which can in some sense be said to be provided by the employer." These steps were not even upon the premises of the employer. They were not used in his business, but they were a part of the way over which the employer had a right of passage for itself and its employees, to enable them to reach its place of business. In *Moynihan* v. *King's Windsor Cement Dry Mortar Co.* 168 Mass. 450, 452, upon the question whether a swinging stage was a part of the defendant's ways, works or machinery, the court said: "It would seem that an action could not be supported on that ground without proof that the defendant controlled or managed it. *Trask* v. *Old Colony Railroad*, 156 Mass. 298. *Engel* v. *New York, Providence, & Boston Railroad*, 160 Mass. 260." See also *Hyde* v. *Booth*, 188 Mass. 290; *Dunn* v. *Boston & Northern Street Railway*, 189 Mass. 62. In holding that the steps were not a part of the defendant's ways or works, we do not find it necessary to go so far as this court has formerly gone in deciding similar cases.

It is equally true, for the same reasons, that the defendant was not liable to the plaintiff for the condition of the place at common law. The party responsible for the safety of the steps to the persons using them by invitation, was their owner, who retained them in his control. As a master, the defendant was liable to its servant at common law, only for the condition of

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those things provided by it which were directly connected with the business.

The plaintiff has argued, under the decision in *Woods* v. *Naumkeag Steam Cotton Co.* 134 Mass. 357, that the owner of the building would not be liable to this plaintiff, who was there under the tenant's right, and that therefore the tenant ought to be held liable. That decision goes upon the ground that a tenant who, in connection with the hiring of his premises, hires a right of way over other property of his landlord, takes the way as it is, except for concealed defects of which the landlord ought to inform him, and that the landlord is not bound to change its construction or obvious condition; also upon the further ground that the hiring of such a right of way does not put upon the landlord a duty of removing snow and ice which accumulate solely from natural causes. The hirer takes his right to use the way as it may be affected by snow or rain falling upon it. In that case it appeared that there was no change in the condition of the steps, "except that resulting from the accumulation of ice and snow." While it was held that the landlord was not bound to change the construction of the steps nor to remove snow or ice that accumulated on them from natural causes, it was not decided that the landlord might not be liable for a negligent use of the steps by himself or by other persons, which left them in a very rough and dangerous condition.

The liability of the defendant in this case does not depend upon the question whether the owner is liable, nor can the plaintiff justly complain if she is held to the rule applicable between landlord and tenant, that one having a right of way out of doors, cannot compel the owner of the way to protect it from the direct effects of rain or snow.

Exceptions overruled.

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MARY E. SHAUGHNESSY *vs.* CITY OF BROCKTON.

Plymouth. November 10, 1910. — November 22, 1910.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Way, Public, abandonment of layout. *Damages*, For property taken or damaged under statutory authority. *Municipal Corporations*.

A city by an order of its common council in 1883 laid out a public street and established its grades. Within two years thereafter the street was constructed, but a sidewalk in front of a certain lot abutting thereon was one inch below the established grade at one end and ten inches below at the other end. Thereafter until 1905 the street was wrought for travel, a street railway was laid thereon, and water, sewer and gas pipes were laid therein, all in conformity with the grades established in 1883 except as to the sidewalk mentioned. In 1905, the mayor and aldermen passed an order reciting that, "whereas in our opinion public convenience does so require, it is ordered: that the superintendent of streets be . . . directed to complete . . . sidewalks" on the street in question in front of premises which included the lot referred to "and upon the completion of the said work to report to this board a schedule of the cost thereof, in front of the estate of each abutter in said portion of way in front of which the sidewalk is not already completed as aforesaid." Acting under such order a sidewalk was built in front of the lot mentioned at the level established by the order of 1883, which was above the level of the lot, and the owner of the lot petitioned for an assessment of his damages. *Held*, that, on the foregoing facts it was not erroneous for a judge, who heard the case without a jury, to find and rule that before the order of 1905 the city had abandoned the mode of construction prescribed in 1883, that the order of 1905 was an original proceeding and that the work done thereunder was not done under the order of 1883, and consequently that the petitioner might recover damges therefor.

PETITION, filed in the Superior Court on June 29, 1907, for the assessment of damages to real estate of the petitioner on North Montello Street in Brockton, caused by the raising of the sidewalk so as to leave the petitioner's land below the level of the sidewalk.

The case was heard by *Harris*, J., without a jury, on an agreed statement of facts which permitted the court to "draw all legal and proper inferences" from the facts agreed upon.

The facts agreed upon were substantially as follows:

North Montello Street, upon which the petitioner's land abuts, was laid out between the south line of Battles Street and Howard Street, a distance of about four thousand feet, under an order adopted by the mayor and aldermen of the city on October 15,

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1883, and within two years thereafter was entered upon for the purpose of constructing the street, and the street was built forthwith. Since its construction the street has been wrought for travel, a street railway laid thereon, water, sewer and gas pipes laid therein, all in conformity with the grade established under the order of 1883, and many residences and a factory have been built along the line thereof.

On September 25, 1905, the mayor and aldermen passed the following order: "Whereas in our opinion public convenience does so require, it is Ordered: That the Superintendent of Streets be and he is hereby directed to complete with edgestones the sidewalks on the east and west sides of North Montello Street, between East Battles Street and 'St. Edward's Church,' and upon the completion of the said work to report to this Board a schedule of the cost thereof, in front of the estate of each abutter in said portion of way in front of which the sidewalk is not already completed as aforesaid."

Under the foregoing order, the respondent raised the sidewalk along the entire front of the petitioner's estate, from a height of one inch at the southwest corner thereof to a height of ten inches at the northwest corner, leaving the estate below the level of the street. Edgestones also were placed along the outer edge of the said sidewalk. The portion of the street where such work was done never had been built to the grade called for by the order of 1883. The work brought that part of the street included in the sidewalk up to the grade called for in the order of 1883.

At the time of the layout of the street under the order of 1883, the land was owned by the father of the petitioner, from whom it descended to the petitioner. No damages were awarded to the petitioner's father, and no claim or petition therefor ever was filed by him.

The respondent contended that the damage to the land of the petitioner was done in carrying out the order of 1883, and that the petitioner therefore had no right to damages therefor. The petitioner asked the judge to rule (1) that the defense offered by the respondent was no legal answer to the petitioner's claim; (2) that on the evidence as a matter of law a period of twenty-two years between the layout of the street and the final work thereon, bringing it to the grade originally established, was an

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unreasonable delay on the part of the city and amounted to an abandonment of its construction under the original layout, and that any work thereon after such period could not be held to be work under such original layout; (3) that the work in raising the grade of the street in front of the petitioner's estate could not be held to be under the order of 1883; and (4) that the order of 1905 was an original proceeding regulated by statute, and on the facts agreed the petitioner could recover for damages sustained thereunder.

The judge gave all of the rulings asked for by the petitioner, and found for the petitioner in the sum of $250. The respondent alleged exceptions.

The case was submitted on briefs.

W. G. Rowe, for the respondent.

L. E. Chamberlain & E. H. Fletcher, for the petitioner.

SHELDON, J. Under the agreement of the parties, the only question raised is whether the work done in front of the petitioner's estate was done under the order for the original layout of the street made in 1883 or as an independent proceeding under the order of 1905.

It could not have been ruled as matter of law that the work was done under the original layout. *Cambridge* v. *County Commissioners*, 125 Mass. 529. *Albro* v. *Fall River*, 175 Mass. 590, 592. The agreed facts provided that inferences might be drawn from the facts stated, and the order of 1883 was put in evidence.

The judge certainly was warranted in finding that as to that part of the street on which work was done under the order of 1905 the city had abandoned the mode of construction prescribed in 1883, as was done in *Como* v. *Worcester*, 177 Mass. 543. We cannot say that the rulings made at the trial were not based upon such a finding. If so, they were correct.

Moreover, the order of 1905 does not purport to be an order for the completion of the original construction begun under the layout of 1883. It seems rather to have been made under the provisions of R. L. c. 49, § 42. The clause that the cost of the work in front of the estate of each abutter should be reported to the board of aldermen bears out this view.

We see no error in the rulings made at the trial.

Exceptions overruled.

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JOHN W. DIXON *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

Bristol. October 25, 1910. — November 25, 1910.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Negligence, Due care of plaintiff, Proximate cause, In freight yard, Railroad. *Proximate Cause. Railroad.*

In an action against a railroad corporation by the driver of a meat wagon, who had been sent by his employer to unload beef from a car standing on a track in a freight yard of the defendant, if there is evidence that the plaintiff, seeing the driver of another team struggling to restrain a plunging horse upon or close to a track of the defendant on which a train was approaching, went to the assistance of such other driver for the purpose of rescuing him from impending danger and in doing so went upon the track and was run over by the train, and was injured, the question whether the plaintiff was in the exercise of due care is for the jury.

Collection by SHELDON, J., of authorities in other jurisdictions, supporting the proposition, that it may not be negligence for one, who is not acting rashly or recklessly, to expose himself voluntarily to great danger and even to the risk of life and limb, in order to rescue another from a like peril, and that such a voluntary exposure is not to be regarded as rash or reckless if there appears to be a fair chance of success, although the person attempting the rescue knows that it involves great hazard to himself without a certainty of accomplishing the rescue.

In an action against a railroad corporation by a person who was run over by a train of the defendant when he was attempting to rescue another person from impending danger upon a track on which a train of the defendant was approaching, if the plaintiff was in the exercise of due care in incurring the risk of injury for the purpose of the attempted rescue, the defendant will be held liable if it was negligent either toward the plaintiff or toward the person whom he was attempting to rescue, because negligence toward such last named person will be treated as directly inducing the attempt to rescue him and thereby causing the injury to the plaintiff.

In an action against a railroad corporation by the driver of a meat wagon, who had been sent by his employer to unload beef from a car standing on a track in a freight yard of the defendant, it appeared that the plaintiff, seeing the driver of another team struggling to restrain a plunging horse upon or close to a track of the defendant on which a train was approaching, went to the assistance of such other driver for the purpose of rescuing him from impending danger and in doing so was run over by the train and was injured, and it was held that there was evidence for the jury that the plaintiff was in the exercise of due care. There was evidence, upon the question of the negligence of the defendant, that the train which ran over the plaintiff was coming into the defendant's freight yard past an open space about forty feet wide, which was paved and was adapted by the defendant to be used as a driveway by teams coming to the yard to unload cars standing upon the tracks that bordered its sides, that this open space

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was in frequent if not in constant use for this purpose, that the train which injured the plaintiff came in upon the track at one side of the driveway with an unusual noise of puffing, which was likely to frighten and did in fact frighten the horses near the track, and that the engineer and the fireman by keeping a proper lookout as they approached the driveway would have seen that a frightened horse was struggling with his driver on the track in a position which threatened grievous injury to the driver. There also was evidence that before the accident the train had come to a stop or almost to a stop before the plaintiff went upon the track to the assistance of the driver in danger, that the engine then was so near the spot that proper watchfulness exercised by the engineer or the fireman would have disclosed the situation to them at once, and that the train then started up without any notice or warning and struck the plaintiff. There also was evidence that the engineer was the only man in the cab of the engine. *Held*, that there was evidence for the jury of negligence on the part of the servants of the defendant.

TORT for personal injuries sustained on May 22, 1906, in a freight yard of the defendant in Fall River called the Watuppa freight yard, the first count alleging that while the plaintiff was in the exercise of due care the defendant by its servants and agents negligently ran a steam engine upon him, and the second count, afterwards added by amendment, alleging that while the plaintiff was in the exercise of due care the defendant by its agents and servants recklessly and wantonly and with a gross disregard of the plaintiff's safety ran a steam engine upon him. Writ dated June 3, 1907.

In the Superior Court the case was tried before *De Courcy*, J. There was evidence tending to show the following facts:

The accident happened about the middle of the afternoon on track 3. The yard is situated on the north side of Rodman Street, which runs east and west. Five delivery sheds of the defendant are built on the west side of the yard close to the west side of track No. 1. The tracks are numbered in consecutive order from the west to the east. There was a driving space between tracks 3 and 4, where customers of the defendant drove in order to take their freight out of the cars on track 3 on the west side of this driving space and out of those on track 4 on the east side of it. The plaintiff was employed by a wholesale beef dealer in Fall River, and on the day of the accident had driven into the space between track 3 and track 4, to load a meat wagon of his employer from a car on track 4. These delivery tracks of the defendant, 3 and 4, run north from Rodman Street and are substantially parallel. At the north end of the yard the

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defendant's tracks converge into one track and then the line goes east by a single track to the city of New Bedford. Two of the plaintiff's fellow employees had driven into the defendant's yard shortly before the accident, each of them driving a single horse attached to a wagon. One of these wagons had been loaded and was left standing parallel with track 3 and facing toward Rodman Street. The other was backed up to the car on track 4 to be loaded, when the plaintiff drove into the yard. As he came to the car that was being unloaded on track 4, a freight train came into the yard from the south on track 3 in the manner described in the opinion, and frightened the horse that was standing near that track and parallel to it, whereupon the plaintiff cried out to the other two drivers to take care of their horses. One Coombs, the driver of the team that was loaded and was standing near track 3, attempted to control his horse when it started forward and went on to track 3, Coombs holding on to the rein near the bridle. The wagon broke on track 3 and part of the harness broke, letting the wagon down between the rails of track 3 when the engine was from sixty to seventy-five feet away, moving very slowly. The horse continued toward track 2, but turned from track 2 and came back toward track 3, Coombs still clinging to the rein. During this time the freight train was coming on track 3 and had reached a point from twenty-five to fifty feet from the team, when it stopped or seemed to stop, but immediately started up again. The plaintiff, believing that the horse would jump and trample upon Coombs and injure him while he was clinging to the rein, left his own team and went to the assistance of Coombs. At that time the train seemed to have stopped, but, while the plaintiff was attempting to save Coombs, the train came down upon him, struck the wagon that was lying on track 3, and injured the plaintiff.

Other facts are stated in the opinion.

At the close of the evidence the defendant asked the judge for the following rulings:

1. That the plaintiff was not in the exercise of due care and could not recover.

2. That there was no evidence of negligence by the defendant's servants, and that the verdict must be for the defendant.

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3. That on all the evidence the jury must find for the defendant.

The judge refused to make any of these rulings. The defendant excepted to this refusal, and also excepted to so much of the charge of the judge "as related to the rights of the plaintiff upon the track if he believed he might save the life of a person in danger and avoid injury to himself."

Among other instructions, the judge instructed the jury as follows:

"If the plaintiff proves that he sustained this injury while in the exercise of due care and by reason either of the negligence of the defendant's servants in this engine, in the event of your finding he was rightfully on the track, or was injured by the reckless and wanton conduct of the engineer and fireman, or one of them, regardless of his right on the track, then he is entitled to recover; otherwise, your verdict should be for the defendant."

The jury returned a verdict for the plaintiff in the sum of $6,500; and the defendant alleged exceptions. The judge instructed the jury to say in their verdict upon which count it was returned in case they found for the plaintiff. The jury in their verdict stated that they found for the plaintiff on the second count. It was stated in the bill of exceptions that the "counsel agreed that a finding on the second count for the plaintiff included a finding for the plaintiff on the first count and the court so stated to the jury."

F. S. Hall, (*T. J. Feeney* with him,) for the defendant.

J. W. Cummings, (*C. R. Cummings* with him,) for the plaintiff.

SHELDON, J. The jury could find on the evidence that Coombs was in a position of imminent peril, struggling to restrain a plunging horse upon or close to a track of the defendant upon which a train was approaching, and that the plaintiff came to his assistance for the purpose of rescuing him from the peril. The contention of the defendant that Coombs was endeavoring merely to save his master's property and that the plaintiff went upon the track for the sole purpose of assisting Coombs in this effort was for the jury to determine. It was not necessarily and as matter of law a trespass or a negligent act for the plaintiff to attempt to rescue Coombs from the impending danger,

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even at the risk of his own life. It was for the jury to say whether under the existing circumstances the plaintiff's act was so rash and reckless as to preclude a finding that he was in the exercise of due care and was justified in going upon the track. This is the doctrine of *Linnehan* v. *Sampson*, 126 Mass. 506. And there is a great body of authority in other courts for the proposition that it may not be negligence for one not acting rashly or recklessly to expose himself voluntarily to great danger, even to the risk of life and limb, in order to rescue another from a like peril, and that such a voluntary exposure is not to be regarded as rash or reckless if there appears to be a fair chance of success, whether the person in danger is or is not a child or an aged or decrepit person, and even though the person attempting the rescue knows that it involves great hazard to himself without a certainty of accomplishing the intended rescue. The leading case is *Eckert* v. *Long Island Railroad*, 43 N. Y. 502, and 57 Barb. 555, the doctrine of which has been generally followed. *Pittsburg, Cincinnati, Chicago & St. Louis Railway* v. *Lynch*, 69 Ohio St. 123. *Pennsylvania Co.* v. *Langendorf*, 48 Ohio St. 316. *Becker* v. *Louisville & Nashville Railroad*, 110 Ky. 474. *Gibney* v. *State*, 137 N. Y. 1. *Manzella* v. *Rochester Railway*, 93 N. Y. Supp. 457. *Corbin* v. *Philadelphia*, 195 Penn. St. 461. *West Chicago Street Railroad* v. *Liderman*, 187 Ill. 463. *Donahoe* v. *Wabash, St. Louis & Pacific Railway*, 83 Mo. 560. *Mobile & Ohio Railroad* v. *Ridley*, 114 Tenn. 727. *Louisville & Nashville Railroad* v. *Orr*, 121 Ala. 489. *Peyton* v. *Texas & Pacific Railway*, 41 La. Ann. 861. *Condiff* v. *Kansas City, Fort Scott & Gulf Railroad*, 45 Kans. 256. Other cases are collected in 29 Cyc. 523, 524; 7 Am. & Eng. Encyc. of Law, (2d ed.) 394, 395; and in the note to *Mobile & Ohio Railroad* v. *Ridley*, 4 Ann. Cas. 925, 928.

It follows that the defendant's first request for instructions was properly denied. It is true, as was held in *Linnehan* v. *Sampson*, 126 Mass. 506, and in many of the other cases above cited, that it is for the jury to say, upon all the circumstances, including the existing emergency and the need of immediate action under which they may find that the plaintiff acted, whether in fact his conduct was that of a reasonably prudent man; and it may be that the judge in his charge did not go far

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enough in requiring the jury, upon this issue, only to find whether the plaintiff "saw, and as a reasonable man believed that Coombs was in imminent danger of his life," and "believed that he could rescue Coombs . . . and at the same time avoid danger himself." But it is not clear that this question was intended to be saved; it has not been argued by the defendant; and we need not consider it.

But it is necessary in this case, as in all similar actions, that negligence on the part of the defendant or its servants should be shown, even though the plaintiff was himself free from all blame. *Hirschman* v. *Dry Dock Railroad*, 46 App. Div. (N. Y.) 621. *De Mahy* v. *Morgan's Louisiana Co.* 45 La. Ann. 1329. *Spooner* v. *Delaware, Lackawanna & Western Railroad*, 115 N. Y. 22. *Evansville & Crawfordsville Railroad* v. *Hiatt*, 17 Ind. 102. *Thomason* v. *Southern Railway*, 113 Fed. Rep. 80. In such a case as this, however, it is enough to hold the defendant if there was negligence on its part toward either Coombs or the plaintiff. *Maryland Steel Co.* v. *Marney*, 88 Md. 482. *Saylor* v. *Parsons*, 122 Iowa, 679. *Donahoe* v. *Wabash, St. Louis & Pacific Railway*, 83 Mo. 560. Its negligence towards Coombs will be treated as directly inducing the attempt to rescue him and thereby causing the injury to the plaintiff. Such negligence could be found if the defendant was running its train in a manner likely to cause injury to any one properly in that vicinity. That was the only negligence that was shown in many of the cases already referred to. In our opinion there was such evidence here. This train was coming into the defendant's freight yard past an open space about forty feet wide, arranged, paved and adapted by the defendant for use as a driveway by teams coming to the yard to unload cars standing upon the tracks that bordered its sides. Coombs and the plaintiff, like all other teamsters having occasion to come to this yard to receive freight for their employers, were invited by the defendant to come to this space with their horses and wagons, and there take their goods from the cars which the defendant thus treated as its temporary freight houses. *Ladd* v. *New York, New Haven, & Hartford Railroad*, 193 Mass. 359. Apparently the open space was in almost constant, certainly in frequent, use for this purpose. It was the duty of the defendant's servants in charge of

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trains coming upon adjacent tracks to run them with this fact in mind, so as to avoid the risk of accidents. But there was evidence that this train came in upon track number three, with more than usual noise of puffing through the smoke stack, much louder, both Coombs and the plaintiff testified, than they had heard before in that vicinity, in a manner which was likely to frighten and did actually frighten the horses. The jury could find also that the engineer and the fireman ought, by keeping a proper lookout as they approached this driveway, to have seen that a frightened horse had broken away from its wagon and was struggling with Coombs upon the track, in a position which threatened grievous injury to him. If so, it could be found that they were negligent in failing to see this, or if they saw it, in not stopping their engine in season to avoid the accident. Besides this, there was evidence that the train had come either to a full stop or almost to a stop before the plaintiff went across the track to the assistance of Coombs, at so small a distance that proper watchfulness by the engineer or the fireman would at once have disclosed the situation to them, and that it then had started up without any notice or warning and struck the plaintiff. There was evidence also that only one man, the engineer, was in the cab of the engine. Under these circumstances we are of opinion that the defendant's second and third requests were rightly refused. And we do not find that any request was made or that any exception was saved by the defendant which raises the question what duty, if any, it owed to the plaintiff if, although he had gone upon its track for the purpose of rescuing Coombs from deadly peril and so was not a mere trespasser or necessarily negligent, yet his presence there was, without fault on their part, unknown to its servants who were in charge of the train. This is of course a different question from that of his right to go or to be upon the track at all; and the latter point is all that seems to have been saved or that has been argued by the defendant's counsel as to this part of the case.

It has been earnestly contended that there was no evidence that the plaintiff's injury was due to any reckless or wanton conduct of the defendant's servants. But the parties had agreed that a verdict on the second count for the plaintiff included a

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like verdict on the first count. There was no hardship to the defendant in this agreement, because the judge, evidently with the consent of the plaintiff, ruled that he could not recover upon the second count without proof of his own care. Of course this ruling could not have been given unqualifiedly without the plaintiff's consent. *Banks* v. *Braman*, 188 Mass. 367, and 192 Mass. 162, note. *Aiken* v. *Holyoke Street Railway*, 180 Mass. 8, and 184 Mass. 269. *Yancey* v. *Boston Elevated Railway*, 205 Mass. 162, 169. It follows that the plaintiff is at least entitled to a judgment upon the first count, and we need not consider whether there was evidence to sustain the finding that the injury to him was done recklessly, wantonly and with gross disregard of his safety.

Exceptions overruled.

ARTHUR BISHOP *vs.* FRANK L. BURKE.

Essex. November 1, 1910. — November 30, 1910.

Present: KNOWLTON, C. J., HAMMOND, LORING, SHELDON, & RUGG, JJ.

Evidence, Presumptions and burden of proof. *Corporation*. *Deed*, Execution, Delivery. *Agency*, Ratification of acts of agent. *Land Court*, Appeal, Report as evidence. *Practice, Civil*, New trial of issues from Land Court.

On an appeal to the Superior Court from a judgment in a writ of entry before the repeal of St. 1905, c. 288, making it the duty of the judge of the Land Court to file a report of his findings of fact which should be *prima facie* evidence of the facts therein stated, the report of the judge of the Land Court, who had found for the tenant, stated in substance that the land in question had been conveyed by a certain corporation to an unincorporated religious society subject to a condition subsequent, that, after the condition subsequent had been broken but without the corporation's making an entry upon the land, its treasurer signed and sealed in the name of the corporation a deed of the premises to the tenant and handed the deed to him; that thereafter the unincorporated religious society gave a deed of the premises to the demandant; that subsequently the corporation by an officer duly authorized made an entry upon the land and gave a proper deed to the tenant; that, although, if the treasurer of the corporation was authorized to sign the deed in its behalf, the deed would have operated as an extinguishment of the right of entry for breach of the condition subsequent and would have given to the unincorporated society an absolute power of disposal, he found that the treasurer was not so authorized, and therefore found for the tenant. One issue framed for the jury was, whether the first deed, which purported to be that of the corporation, was authorized by it. The deed itself, purporting to be signed in the corporation's name by its treasurer and to be

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duly acknowledged by the treasurer as its deed, was in evidence, as well as certain votes of the executive committee of the corporation having power to dispose of the corporation's land, which in substance referred the matter of the sale of the land to the treasurer "with power." *Held*, without passing on the question whether the effect of the deed, if valid, would be that stated by the judge of the Land Court, that the issue as to whether the deed in question was authorized by the corporation was for the jury.

On the question, whether there was any authority for the execution and delivery of a deed, signed in the name of a corporation by its treasurer, bearing the corporation seal and acknowledged as the deed of the corporation by the treasurer, the deed itself is evidence.

Evidence, that the treasurer of a corporation, who was authorized to make a sale of land of the corporation, in an attempted completion of a sale of the land, handed a deed of the land to the person named as grantee therein, who retained the deed in his possession and control for more than three months, is evidence that the deed was duly delivered to such person.

Although, by accepting the purchase price paid for certain of its land, a corporation may have ratified the acts of an officer who had assumed to sell the land on its behalf, it does not thereby ratify his act in executing to the purchaser in the name of the corporation a deed, the effect of which would be to prevent the carrying out of the sale.

On appeal to the Superior Court from a judgment of the Land Court in a writ of entry, the determination of which depended upon whether or not a deed, which purported to be executed on behalf of a corporation by one of its officers in completion of a sale previously made by the officer on behalf of the corporation, was authorized and delivered by it, three issues were framed and submitted to the jury, the first being, whether the deed was authorized by the corporation, the second, whether it was delivered to the purchaser, and the third, whether its execution and delivery were ratified by the corporation. The presiding judge directed that all the issues be answered in the negative. The tenant alleged exceptions. This court held that there was evidence which would have warranted affirmative answers to the first and second issues, but that, because the execution and delivery of the deed by the corporation would have been in direct contravention of the act which was relied on as an act of the corporation in ratification of the deed, further held that the verdict on the third issue was ordered properly, and *therefore directed* that there should be a new trial on the first and second issues, and that the verdict on the third issue should stand.

WRIT OF ENTRY to recover possession of certain real estate in Rowley. Writ in the Land Court dated April 14, 1908.

In the Land Court the case was heard by *Davis*, J., who found for the tenant and filed the following report:

"The land in controversy in this case is situated on the westerly side of Central Street in the town of Rowley, and was formerly the property of, and occupied by, the First Universalist Parish of Rowley. A small strip of land covered by the writ is not in controversy and a disclaimer has been filed in regard to it.

"In January, 1878, title to the land in controversy was

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conveyed by said Parish to the Massachusetts Universalist Convention for the purpose of having it re-conveyed by the Convention upon condition that in case said Parish should fail to maintain preaching by a clergyman in fellowship with said Convention, or should itself fail to continue in such fellowship for a period of two consecutive years, the land should revert to the Convention, and on April 29, 1878, the land was accordingly re-conveyed by the Convention to the Parish, upon condition as above stated, and with express provision that on breach of said condition the premises should revert to said Convention.

"Subsequently preaching was discontinued on the demanded premises, and there was an entire breach of the condition in said deed from the Convention to the Parish.

"In 1905 there were some negotiations, but without result, between officers of the Convention and officers of the Parish looking toward a release of title by the Parish to the Convention. The Convention is a Massachusetts corporation. In its popular acceptation, however, the 'Convention' is merely the annual meeting of the corporation, at which religious affairs appertaining to the Universalist Church in this State are discussed and voted upon. No property rights of the corporation are discussed or voted upon at the annual meeting of the Convention, but under section 5 of article 5 of the by-laws of the corporation an executive committee is provided for who 'shall have charge of the general interests of the Convention, direction of its business operations, the disposition of its real estate or any interests therein by sale, lease or otherwise'; and by section 4 of said article 5 a treasurer is provided for who 'shall execute in proper form deeds, leases or other instruments affecting any real estate owned or controlled by this Convention, with the approval of the executive committee.'

"In November, 1905, the demandant made an offer for the demanded premises to the secretary of the Convention, who communicated the offer to the executive committee, and on November 8, 1905, notified the demandant that 'our board met last Monday and gave the treasurer personal discretion in the matter, so I presume he will decide this week what to do.' No further action was taken in regard to the matter at that time, however. In April, 1906, the executive committee voted that the treasurer

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of the Convention be authorized to enter upon and take possession of the real estate of the First Universalist Parish of Rowley for breach of conditions in the deed to said Parish by the Convention. In June, 1907, a report was submitted to the executive committee advising the raising of funds by the Convention for the payment of a certain mortgage on church property in Boston, 'by the sale of properties once held and used by edifices now defunct, for example, Rowley' and others, and 'on motion of Brother Horton it was voted to refer this whole matter to the Secretary and Treasurer with power.' In December, 1907, the tenant saw the secretary of the Convention and made to him an offer of $800 for the demanded premises, together with a small strip of adjoining land, not now in controversy, and the secretary referred the offer to the treasurer. Thereafter the treasurer undertook to have a deed prepared. On December 23, 1907, the tenant met the treasurer in the office of the Convention, paid him $800, and received an instrument purporting to be a quitclaim deed from the Convention corporation to himself of land including the demanded premises, executed in the name of the corporation by the treasurer, with a paper facsimile of the corporation seal affixed, and acknowledged by the treasurer to be the free act and deed of the corporation. When this deed was delivered by the treasurer to the tenant it was delivered with the statement that it lacked a vote confirming it, and also that the Convention was to have a new deed from the Parish 'free from restrictions,' and with a request that this deed should not be recorded until the receipt by him of the other instruments. At a meeting of the executive committee on January 6, 1908, 'the treasurer, Mr. Buttrick, reported the sale by the Convention through its treasurer of the church property at Rowley to Frank L. Burke for $800 cash, and the addition of that amount by him to the permanent funds of the Convention.' The tenant within a week thereafter entered upon the demanded premises, and made an offer to sell them to the demandant, and within a month had the building shingled, and stored property there. After the tenant received said deed of December 23, 1907, counsel was consulted, and on March 25, 1908, the tenant returned said deed without its ever having been recorded.

"On April 6, 1908, the executive committee voted that the

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treasurer be authorized in behalf of the Convention to enter upon and take possession of the land described in the deed from the Convention to the Parish of April 29, 1878, for breach of the condition contained in said deed and for the purpose of revesting the title in the Convention; on April 10, 1908, a certificate of such entry was recorded in the Registry of Deeds; and on the same day a new deed from the Convention to the tenant of land including the demanded premises, reciting said deed from the Convention to the Parish, breach of condition therein and entry made and possession taken for such breach of condition, was executed in behalf of the Convention by the treasurer, and delivered to the tenant, accompanied by a certified copy annexed thereto of a vote of the executive committee passed on April 6, 1908, authorizing the treasurer to sign, seal, acknowledge and deliver said deed to the tenant. This deed also was recorded on said April 10, 1908. On May 4, 1908, the executive committee voted that 'the treasurer be authorized to give Mr. Burke a bond for $800 to indemnify him against possible loss for pending litigation over the title to the property deeded to him by this Convention in exchange for the purchase price of $800.

"Meantime, at a meeting of the Parish held on February 17, 1908, the Parish voted to sell all the property, real or personal, that remained in their hands as a Parish at public auction on February 29, 1908, and that the Standing Committee be authorized to give a quitclaim deed or deeds of the same to the purchaser. An auction was held accordingly. The demandant bid $150 for the remaining property of the Parish, including the demanded premises, was the highest bidder therefor, and it was knocked down to him by the auctioneer; and on said February 29, a quitclaim deed of the land including the demanded premises was executed in behalf of the Parish by its Standing Committee to the demandant, delivered to him, and by him recorded on March 10, 1908.

"As matter of law an attempted grant of land held on condition made by the holder of the right of reverter or right of entry for breach, before such entry is made, does not operate to convey the property to the attempted purchaser, but operates merely as an extinguishment of the condition. It seemed to me on the foregoing evidence clear that whatever authority the Con-

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vention had delegated to any of its officers in regard to this property, was authority in regard to a sale, and in regard to a sale only, of the real estate. There was no intention manifested to release the condition, and no authority voted to any one looking thereto, or to any other action than a sale of the property for its full value, and the execution of instruments proper to effectuate such sale.

"On the foregoing evidence therefore I ruled that the deed of December 23, 1907, from the Convention to the tenant was not authorized by the grantor corporation therein named, and further ruled that it was not ratified by the subsequent votes or action of the executive committee above recited, in regard to the $800 received from the tenant or otherwise. I therefore found for the tenant and ordered judgment accordingly."

The demandant appealed to the Superior Court and the following issues were framed:

"1. Was the instrument dated December 23, 1907, purporting to be a deed from the Massachusetts Universalist Convention to Frank L. Burke, authorized by said Convention?

"2. Was said instrument duly delivered to the tenant?

"3. Was the execution and delivery of said instrument to the tenant duly ratified?"

In the Superior Court the case was tried before *Fox*, J. The report of the judge of the Land Court was in evidence. The deed dated December 23, 1907, referred to in the first issue, also was in evidence. This was signed, "Massachusetts Universalist Convention, by Sidney H. Buttrick, Treasurer," and bore a seal purporting to be the corporate seal, and an acknowledgment by Sidney H. Buttrick that it was "the free act and deed of the Mass. Universalist Convention."

There was evidence that, when the deed was handed to the tenant by the treasurer of the Convention, there was nothing said as to its validity. The treasurer, however, testified as follows: "When I handed him [the tenant] the instrument of December 23, 1907, I told him that possibly this was not a valid deed, that I didn't consider it so, that we had had information from the clerk of the Rowley church that they would prepare a deed deeding the property to the Universalist Convention at any time we wished, and I expected to get a deed from them;

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in the event I didn't get this deed it would be necessary to have other papers to have this deed valid, and for him to hold it and not put it on record as I didn't consider it a valid deed. I am sure that this conversation occurred when I gave this deed to Mr. Burke, and not at a later date."

At the close of the evidence the presiding judge directed the jury to answer each of the issues in the negative; and the demandant alleged exceptions.

The case was submitted on briefs.

W. A. Bishop, for the demandant.

G. B. Blodgette, for the tenant.

SHELDON, J. The correctness of the rulings made at the trial depends, as to each one of the issues, upon the question whether there was any evidence tending to prove the affirmative of that issue. The report of the judge of the Land Court made a *prima facie* case for the tenant, and required a negative answer to each issue unless there was some evidence to the contrary. See St. 1905, c. 288, which had not been repealed when the appeal in this case was taken and entered.* It was assumed, although that question is not before us and we express no opinion upon it, that if these issues were found in the affirmative, the effect of the tenant's first deed, from a grantor having then merely the right to enter for breach of a condition and not holding any estate in the land, was merely to extinguish or suspend that right of entry and the condition upon which it depended, and to give an absolute power of disposal to the general owner, under whom the demandant claims. *Thompson* v. *Bright*, 1 Cush. 420, 428. *Guild* v. *Richards*, 16 Gray, 309, 317. *Hubbard* v. *Hubbard*, 97 Mass. 188. *Hopkins* v. *Smith*, 162 Mass. 444, 447.

1. Without passing at all upon its weight, we are of opinion that there was evidence that this deed was authorized by the Convention. The bare production of the deed, duly executed in its name by its treasurer, with its corporate seal affixed, was some evidence that its execution and delivery had been authorized. *Burrill* v. *Nahant Bank*, 2 Met. 163. *Parker* v. *Washoe Manuf. Co.* 20 Vroom, 465. *Crumlish* v. *Railroad*, 32 W. Va. 244. *Reed* v. *Bradley*, 17 Ill. 321. *Smith* v. *Smith*, 62 Ill. 493, 497. The authority which it could be found had been

* The repealing statute is St. 1910, c. 560, § 2.

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given to sell this property could be found to include authority to execute whatever deeds were thought necessary to pass the title. *Alger* v. *Fay*, 12 Pick. 322. *Valentine* v. *Piper*, 22 Pick. 85, 90.

2. As to the second issue, the testimony that the deed had been handed to him by the treasurer of the Convention in the attempted completion of a sale which the treasurer was authorized to make, and that it had for more than three months remained in the possession and control of the tenant, was evidence that it had been duly delivered to him. *Ward* v. *Lewis*, 4 Pick. 518, 520. *Valentine* v. *Wheeler*, 116 Mass. 478. *Butrick* v. *Tilton*, 141 Mass. 93. *Jones* v. *New York Life Ins. Co.* 168 Mass. 245. There was also evidence that there had been no absolute unconditional delivery of the deed; but the question was for the jury. Whether the demandant would derive any benefit from prevailing upon this issue if he failed to support the affirmative of one of the other issues, we have not now to consider.

3. The verdict upon the third issue was rightly ordered. It could no doubt have been found that the Convention by accepting the tenant's money ratified the sale to him and all the steps thereto that would have been appropriate for the carrying out of that sale. But it would not follow that it ratified an act of the treasurer which, if the demandant's contention is sound, could tend only to prevent the carrying out of the sale which it intended to ratify. And we find no evidence that either the Convention or its executive committee intended to adopt blindly whatever had been done by the treasurer, or acted with knowledge of what he really had done. Unless one of these alternatives were proved, its acceptance of the purchase money would not be a ratification of the act of its treasurer in giving the deed to the tenant. *Murray* v. *Nelson Lumber Co.* 143 Mass. 250. *Foote* v. *Cotting*, 195 Mass. 55, 62. There was such evidence in *Monnahan* v. *Judd*, 165 Mass. 93, and *Beacon Trust Co.* v. *Souther*, 183 Mass. 413.

The verdict upon the third issue must stand; but the demandant's exceptions must be sustained as to the first and second issues, and there must be a new trial upon those issues only.

So ordered.

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COMMONWEALTH *vs.* ERVING H. MIXER.

Essex. November 1, 1910. — November 30, 1910.

Present: KNOWLTON, C. J., HAMMOND, LORING, SHELDON, & RUGG, JJ.

Intoxicating Liquors. Intent. Carrier, Of goods.

To a complaint under St. 1906, c. 421, charging the defendant with transporting for hire intoxicating liquor into a city where licenses of the first five classes for the sale of intoxicating liquors were not granted, without first having been granted a permit so to do, it is no defense that the defendant did not know and had no reason to surmise that there was intoxicating liquor in the package which he is shown to have transported.

Collection by RUGG, J., of cases dealing with criminal offenses created by statute in which innocence of intent is no defense.

It seems, that a common carrier of goods, in order to protect himself against committing the crime created by St. 1906, c. 421, has a right under the proper circumstances to inspect packages offered for transportation for the purpose of ascertaining whether they contain intoxicating liquors and may refuse to take any package which he is not allowed to inspect in a reasonable manner for this purpose.

RUGG, J. This complaint under St. 1906, c. 421, charges the defendant with illegally transporting intoxicating liquor into the city of Lynn, where no licenses of the first five classes for the sale of intoxicating liquor and no permits to transport such liquor into the city had been granted. The defendant, a driver in the employ of a common carrier, had upon his load for transportation in Lynn a sugar barrel, not marked by the seller or consignor as required by R. L. c. 100, § 49, for packages containing intoxicating liquor. There was nothing about the appearance of the barrel to cause suspicion as to its contents, and the defendant was ignorant of the fact that it contained intoxicating liquor. In the Superior Court the presiding judge * refused to instruct the jury that unless the defendant knew that the barrel contained intoxicating liquor or from its appearance and all the circumstances ought reasonably to have been put on inquiry as to its contents, he should be acquitted. The question presented is whether this refusal was error. Broadly stated the inquiry is whether a common carrier or his servant can be convicted of the crime of illegally transporting intoxicating liquor under the

* *Bell*, J.

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statute, when he does not know and has no reason to surmise that there is intoxicating liquor in a package delivered for transportation by a seller or consignor who has violated the law by failing to mark such package plainly and legibly with the kind and amount of liquor it contains.

In the prosecution of crimes under the common law apart from statute, ordinarily it is necessary to allege and prove a guilty intent, and as a general principle a crime is not committed if the mind of the person doing the act is innocent. An evil intention and an unlawful action must concur in order to constitute a crime. But there are many instances in recent times where the Legislature in the exercise of the police power has prohibited under penalty the performance of a specific act. The doing of the inhibited act constitutes the crime and the moral turpitude or purity of the motive by which it was prompted and knowledge or ignorance of its criminal character are immaterial circumstances on the question of guilt. The only fact to be determined in these cases is whether the defendant did the act. In the interest of the public the burden is placed upon the actor of ascertaining at his peril whether his deed is within the prohibition of any criminal statute. There are many illustrations of such exercise of legislative power, as for instance, the selling of milk below a designated standard, *Commonwealth* v. *Wheeler*, 205 Mass. 384, *Commonwealth* v. *Warren*, 160 Mass. 533; the driving of an unregistered automobile, *Feeley* v. *Melrose*, 205 Mass. 329, 334; being present where gaming implements are found, *Commonwealth* v. *Smith*, 166 Mass. 370; obstructing a highway more than five minutes even through unlawful interference by trespassers, *Commonwealth* v. *New York Central & Hudson River Railroad*, 202 Mass. 394; bigamy and adultery by marriage with one honestly, upon reasonable ground but mistakenly, supposed to be single, *Commonwealth* v. *Mash*, 7 Met. 472, *Commonwealth* v. *Thompson*, 11 Allen, 23, *Commonwealth* v. *Hayden*, 163 Mass. 453, 457; killing for sale an animal under a designated age, *Commonwealth* v. *Raymond*, 97 Mass. 567; being present where implements for smoking opium are found, *Commonwealth* v. *Kane*, 173 Mass. 477; admitting a minor to a billiard hall, *Commonwealth* v. *Emmons*, 98 Mass. 6; selling adulterated milk, *Commonwealth* v.

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Farren, 9 Allen, 489; storing and selling naphtha, *Commonwealth* v. *Packard*, 185 Mass. 64, *Commonwealth* v. *Wentworth*, 118 Mass. 441; sale of imitation butter inadvertently not wrapped as directed by the employer and required by law, *Commonwealth* v. *Gray*, 150 Mass. 327. See also *Commonwealth* v. *Lavery*, 188 Mass. 13; *Commonwealth* v. *Murphy*, 165 Mass. 66; *Commonwealth* v. *Connelly*, 163 Mass. 539; *Commonwealth* v. *Shea*, 150 Mass. 314; *Commonwealth* v. *Julius*, 143 Mass. 132; *Commonwealth* v. *Dyer*, 128 Mass. 70. This principle has been very frequently applied to statutes respecting intoxicating liquor. In *Commonwealth* v. *Boynton*, 2 Allen, 160, it was held that one could be convicted of selling intoxicating liquor even though he had no reason to suppose that it was intoxicating. To the same effect see *Commonwealth* v. *Goodman*, 97 Mass. 117; *Commonwealth* v. *Hallett*, 103 Mass. 452; *Commonwealth* v. *Uhrig*, 138 Mass. 492; *Commonwealth* v. *Savery*, 145 Mass. 212; *Commonwealth* v. *Daly*, 148 Mass. 428; *Commonwealth* v. *O'Kean*, 152 Mass. 584. The sale by a licensed liquor dealer to a minor, though made in good faith and without reason to suspect that the purchaser was below age, *Commonwealth* v. *Stevens*, 153 Mass. 421, *Commonwealth* v. *Finnegan*, 124 Mass. 324; or to one honestly but erroneously supposed to be a guest on the Lord's day, *Commonwealth* v. *Regan*, 182 Mass. 22, *Commonwealth* v. *Joslin*, 158 Mass. 482, 497, *Commonwealth* v. *Barnes*, 138 Mass. 511, have all been held crimes under statutes of this nature. This rule prevails generally though not universally throughout the United States. See cases collected in 12 Ann. Cas. 470, 6 L. R. A. (N. S.) 477 and 25 L. R. A. (N. S.) 669. It was assumed in *Commonwealth* v. *Riley*, 196 Mass. 60, that the crime created by R. L. c. 100, § 50, of delivery by a regular expressman of intoxicating liquor without entering it in a book belonged to this class.

It becomes necessary to examine the terms and history of the statute upon which the present complaint is founded, and the antecedent enactments of the Legislature touching the general subject, to determine whether it falls in the same class. The local option license law now prevailing was first enacted by St. 1875, c. 99. It contained no provision respecting the transportation of liquors. By St. 1878, c. 207, the transportation of

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intoxicating liquors into municipalities where licenses were not granted, with intent to sell or having reasonable cause to believe that they were intended to be sold in violation of law, was forbidden, and whoever wilfully violated any provision of the law was subject to punishment. In a respect immaterial to the present inquiry, this statute was amended by St. 1879, c. 282. By the consolidation of pre-existing enactments in Pub. Sts. c. 100, § 18, the word "wilfully" was omitted, and has not since appeared in any statute touching the transportation of intoxicating liquor.

St. 1897, c. 271, required plain and legible marking of the packages with the name of the consignee and the keeping of minute records by the common carrier respecting all packages containing intoxicating liquor. These provisions were reenacted in R. L. c. 100, §§ 49–53, both inclusive.

By St. 1906, c. 421, the Legislature made still more stringent and detailed provisions respecting the transportation of liquor into or through no license municipalities. It was enacted by § 1 of this act, under which this complaint is framed, that "No person or corporation, except a railroad or street railway corporation, shall, for hire or reward, transport spirituous or intoxicating liquors into or in a city or town in which licenses of the first five classes for the sale of intoxicating liquors are not granted, without first being granted a permit so to do . . ."; and by § 4 that "Any person violating the provisions of this act shall be punished by a fine . . . or by imprisonment . . . or by both . . ., and any violation of the laws relative to the transportation of intoxicating liquors, by a person holding a permit . . ., shall render such permit void." Sections 2 and 3 of this act make provision for the granting of permits for the transportation of liquors in so called no license cities and towns.

It is obvious from these successive enactments that the Legislature has been struggling to make it more and more difficult to transport liquor secretly into cities and towns where licenses are not granted. It was said by Hammond, J., in *Commonwealth* v. *Intoxicating Liquors*, 172 Mass. 311, at p. 315, while discussing the purpose of St. 1897, c. 271: "The act was manifestly intended to meet some difficulties which had been encountered by the government in the prosecution of common carriers for

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illegal keeping of intoxicating liquors, and to make it more difficult for the guilty to escape detection when setting up the fraudulent defence that the liquors found in the possession of the carrier were for delivery by him as such to some person. It is only one of the many statutes which indicate that the policy of the Commonwealth is to require that the traffic in liquors in this State shall be open, so that every step shall be exposed to the scrutiny of the authorities, and that the violation of the law may be the more easily detected."

The desire of legislative bodies to restrict intemperance by regulation of the transportation and sale of intoxicating liquor is almost universal. It was said in *Scott* v. *Donald*, 165 U. S. 58, 91: "The evils attending the vice of intemperance in the use of spirituous liquors are so great that a natural reluctance is felt in appearing to interfere, even on constitutional grounds, with any law whose avowed purpose is to restrict or prevent the mischief."

No question of constitutionality arises in the present case, for the statute under which this complaint is made is not open to objection in that regard. *Commonwealth* v. *Peoples Express Co.* 201 Mass. 564, 575.

It is earnestly urged in the present case, however, that the defendant's employer, being a common carrier and as such bound to accept all packages offered to him for transportation, and as a general rule having no right to compel a shipper to disclose its contents to him when there is no reason to suspect that the package contains an illegal or dangerous object (*Crouch* v. *London & Northwestern Railway*, 14 C. B. 255, *Parrot* v. *Wells, Fargo & Co.* 15 Wall. 524, the nitro-glycerine case), the statute ought not to be interpreted in such a way as to render him criminally liable if he was in fact innocent of any intent to transgress the law; and it is further pointed out in support of this argument that courts of other jurisdictions have held carriers liable for refusing to transport liquors contrary to an illegal local ordinance, *Southern Express Co* v. *Rose Co.* 124 Ga. 581, and where the carrier had reason to believe that it would be illegally sold after delivery. *Crescent Liquor Co.* v. *Platt*, 148 Fed. Rep. 894. See cases collected in 6 Cyc. 372 B.

Notwithstanding these considerations, we are not inclined to

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relax the rule so plainly laid down in many cases, nor to interfere with the policy of the Legislature respecting the regulation of transportation and sale of intoxicating liquors. While the rule may seem harsh at first sight in some of its applications, this raises not a question of judicial construction but of legislative policy with which the courts cannot interfere so long as no constitutional guaranty is infringed. Although the severity of the rule "has been criticised with inadequate understanding of the grounds for it" (*Commonwealth* v. *Regan*, 182 Mass. 22, 25), they are pointed out with clearness by Holmes, J., in *Commonwealth* v. *Smith*, 166 Mass. 370, at 375, in this language: "When according to common experience a certain fact generally is accompanied by knowledge of the further elements necessary to complete what it is the final object of the law to prevent, or even short of that, when it is very desirable that people should find out whether the further elements are there, actual knowledge being a matter difficult to prove, the law may stop at the preliminary fact, and in the pursuit of its policy may make the preliminary fact enough to constitute a crime."

The Legislature may say with respect to transportation of liquors that ordinarily common carriers do not transport them without either knowing or having reasonable ground to suspect their nature, or that usually packages containing them give some evidence of their contents to those reasonably alert to detect it, or that directly or indirectly some information generally is conveyed to the carrier as to their character. See also *Keller* v. *United States*, 213 U. S. 138, 150. The language of the statute under consideration is plain and unequivocal. It contains no words, such as "wilfully" or "knowingly," indicating a vicious intent as a part of the crime created. There is nothing about it to suggest an exception for the benefit of one who without moral blame violates its terms. Its phraseology discloses a legislative determination that society can best be protected against the evil aimed at by a rigorous application of an inflexible rule. There is no distinction in principle between this and the many other statutes construed in the cases we have cited. It must be assumed that the Legislature in enacting this statute in its present form had in mind the construction placed upon similar statutes. The inference is irresistible that it intended

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no different meaning or interpretation from that expressed in other laws of like character. Moreover railroads and street railways, common carriers which do not deliver merchandise to houses or places of business, are exempted from the operation of the statute although they are subject to the provisions of R. L. c. 100, § 49, as are all shippers of intoxicating liquor, whether by railroad, railway or other carrier. This circumstance tends to emphasize its application to those carriers who deliver goods in such a way as to make especially difficult of detection violations of the law. Evasion of laws of this kind is well known to be more likely to be practised when small quantities are involved. Taking into account the magnitude of the evils arising from the use of intoxicating liquors and the manifest struggle of the Legislature by successive enactments to regulate its transportation so that secrecy may be prevented, and so that those municipalities which have voted "no license" may be protected from furtive and slyly clandestine efforts to override the popular desire for freedom from its illicit traffic, an exemption ought not to be read into the statute contrary to what seems to be a deliberate legislative purpose based upon grounds of public policy. It follows from what has been said that the carrier has a right to use any reasonable efforts, by the establishment and publication of general rules, by specific inquiry, or in proper cases by the inspection of packages, or otherwise, to ascertain whether intoxicating liquors constitute any part of the goods offered for transportation, and to refuse to take any as to which this right is denied, in order to protect himself against committing the crime created by the statute. The nitro-glycerine case, *Parrot* v. *Wells, Fargo & Co.* 15 Wall. 524, involved only the civil liability to third persons at common law on the ground of negligence of a carrier, who had ignorantly and innocently received for transportation nitro-glycerine which exploded in transit. In the opinion, at page 536, from the general statement that the carrier has no right to require a knowledge of the contents of packages, instances of special legislation conferring such right are exempted. In *Crouch* v. *London & Northwestern Railway*, 14 C. B. 255, there was refusal to receive general merchandise offered by transportation merely because of declination by shipper to disclose the contents of the package, but without

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placing the demand for such knowledge on the terms of St. 8 & 9 Vict. c. 20, § 105, which authorized the carrier to refuse to receive explosives. It is apparent from what is said by Jervis, C. J., at p. 291, that if the refusal to receive had been based upon the terms of this section a different result might have been reached. The general rule upon which the defendant relies to the effect that a carrier cannot insist ordinarily upon obtaining knowledge of the character of goods offered for transportation is subject to a well recognized exception where a statute expressly or impliedly confers that right. The statute with which we are dealing is of that class, and by its imposition of criminal responsibility for transporting the prohibited articles necessarily clothes the carrier with power to obtain such knowledge as may protect him, or to refuse to take the proffered goods. See *Bernard* v. *Adams Express Co.* 205 Mass. 254; *Connors* v. *Cunard Steamship Co.* 204 Mass. 310.

Apparently the Supreme Court of Vermont reached an opposite conclusion in *State* v. *Goss*, 59 Vt. 266. It is to be noted, however, that in *State* v. *Audette*, 81 Vt. 400, the same court has held that an erroneous though honest and reasonable belief in the previous death of an earlier consort of one of two parties to a marriage is a defense to a charge of adultery, thus adopting the rule laid down in *The Queen* v. *Tolson*, 23 Q. B. D. 168, rather than the contrary rule steadily followed in this Commonwealth since *Commonwealth* v. *Mash*, 7 Met. 472, 474, and *Commonwealth* v. *Thompson*, 11 Allen, 23, and generally adopted throughout this country.* *State* v. *Swett*, 87 Maine, 99, related to a different kind of crime occurring under distinguishable circumstances, and may not necessarily be inconsistent with the result here reached; but, if it is, we are not disposed to follow it.

Exceptions overruled.

J. W. Sullivan, for the defendant.

H. C. Attwill, Assistant District Attorney, for the Commonwealth.

* *People* v. *Spoor*, 235 Ill. 230. *Parnell* v. *State*, 126 Ga. 103. *Cornett* v. *Commonwealth*, 134 Ky. 613. *Rice* v. *Commonwealth*, 31 Ky. Law Rep. 1354. *Jones* v. *State*, 67 Ala. 84. *State* v. *Armington*, 25 Minn. 29. *Russell* v. *State*, 66 Ark. 185. *Davis* v. *Commonwealth*, 76 Ky. 318. *State* v. *Zichfeld*, 23 Nev. 304. *State* v. *Goodenow*, 65 Maine, 30. *State* v. *Hughes*, 58 Iowa, 165. *Medrano* v. *State*, 32 Tex. Cr. Rep. 214.

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MARY I. CORLISS *vs.* JAMES A. KEOWN & another.
WILLARD H. CORLISS *vs.* SAME.

Essex. November 2, 1910. — December 2, 1910.

Present: KNOWLTON, C. J., HAMMOND, LORING, SHELDON, & RUGG, JJ.

Negligence, In use of dangerous horse, Of independent contractor. *Animal. Agency.*

If the owner of a horse, who knows that the horse is an unsafe animal to be used in the public streets, lends the horse with his driver for such a use to a person who also knows the dangerous character of the horse, and if, while the horse is being driven in a public square under the direction of the borrower, he runs away and injures a traveller on the highway, who is exercising due care, the injured person has a right of action not only against the owner for his negligence in lending the horse for such a use but also against the borrower for making use of the horse in the public streets, knowing him to be dangerous there.

One who actively participates in a negligent use of dangerous property, with full knowledge of the danger to third persons, cannot avoid liability for an injury caused by such dangerous use by showing that he was not acting in his own behalf but was assisting the negligent owner as his agent or servant.

If an agent of the owner of a horse, known both to the owner and the agent to be unsafe for use in the public streets, proceeds to use the horse in the public streets in conducting the business of the owner, taking that business in charge and directing the driver where and how to go, with a full knowledge of the danger of using the horse in such places, and, if the horse while being so used runs away and injures a person travelling on a public street in the exercise of due care, the agent is liable personally to the person injured.

The owner of a carriage, who has not been negligent in failing to inspect it or in inspecting it negligently, is not liable for an injury resulting from a defect in it unknown to such owner and due to the negligence of a carriage maker, who had repaired the carriage under an independent contract which gave him entire control of the business of making such repairs as he thought necessary, to be paid for at a reasonable price.

KNOWLTON, C. J. The first of these actions is by a woman to recover for injuries from being struck by a runaway horse while crossing a public street in the city of Lynn, and the second is by her husband to recover damages resulting to him from her injury. The two defendants are a physician and his mother, who lived in the same house, and were both interested in a hospital maintained by a corporation of which the son was the president and the mother was the treasurer. The horse and carriage by which the plaintiff in the first case was injured belonged to the son, and were being used by the mother on the day of the injury. They were in charge of a driver hired by

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the son. The plaintiffs contended that the accident was caused in part by the defective condition of the carriage and in part by the bad behavior and dangerous proclivities of the horse. The case was tried before the Chief Justice of the Superior Court without a jury, and he found against the defendant James A. Keown, and in favor of the other defendant. The plaintiffs have brought the cases before us on their exceptions.

The weight of the evidence and the findings of the judge indicate that, on the morning of the accident, Dr. Keown lent his horse and carriage and driver to his mother, to be used for a short time in business of which she had official charge, and that in her official capacity she was the proprietor and manager of the business in which the horse and carriage were then being used. He found expressly that "she had the authority to direct the driver where to go and by what streets and at what rate of speed." In legal effect it seems to have been an ordinary case of the owner of a horse and carriage lending them, with his driver, to another person, to be used by that person in his business. In such a case it is held that, in the absence of an express agreement to the contrary, the care and management of the horse is retained by the owner through his driver, who for that purpose and in that part of the business remains his servant. *Shepard* v. *Jacobs*, 204 Mass. 110, 112. *Delory* v. *Blodgett*, 185 Mass. 126, 129.

But in such a case the ownership of the business in which the horse is used and the responsibility for conducting such a business rest with the person to whom the horse and driver are lent. If he is personally negligent through conducting the business in a careless way, whether by the use of instrumentalities known to him to be dangerous, or otherwise, he is liable for the results of his negligence. He would have no right to accept and use in his business a horse, or anything else, that, by reason of its dangerous proclivities or qualities, would expose others to the probability of injury.

The plaintiffs asked for the following ruling: "If the court shall find that the horse or mare used by the defendant Annie Keown at the time of the accident was an unsafe and dangerous animal for the use to which it was being put by the defendant Annie Keown at said time, and the said Annie Keown, or her

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servants, agents or employees knew it or ought to have known it by the exercise of due care, and the plaintiff Mary I. Corliss while on a public street in said Lynn in the exercise of due care became injured by such use, then the defendant Annie Keown is liable to the said plaintiff for her damages by reason of said injuries." In regard to the horse the judge found as follows: "By reason of the disposition to start suddenly, she was an unsafe animal to drive in a public place such as the square where the accident in this case occurred, and of this both defendants had knowledge. The sudden starting of the horse was a cause contributing to the final break of the unfractured portion of the fifth wheel, and on this ground I hold the defendant James Keown liable." He found that the mother was using this horse in driving about the public streets at the time of the accident. Having also found that the horse was an unsafe animal to drive in a public place like the square where the accident happened, and that she knew it, he should have found that she was negligent in using it there, just as he found that her son was negligent in lending it to her for such a use. This is upon the assumption that she was using the horse in her own business, to take money of the corporation as treasurer and deposit it in a bank to the credit of the corporation, and that she asked for the use of the horse for this purpose, all of which was in evidence without contradiction.

Perhaps it ought to be considered whether the use referred to in the request for a ruling could have been of any other kind, that would lead to a different result. The only other view that can be taken of the evidence is that the mother was carrying the money for her son as his agent and representative, and that he was the proprietor of the business in which the horse and carriage were then being used. If that was the fact, she was the person then in charge of the business, and conducting it for the other defendant. After leaving her son, she had the direction and control of the use of the horse, and the driver was subject to her orders as to where and how to go. If, as the judge found, it was a negligent use of the horse by the owner to permit it to be driven on these streets, by reason of the danger of injury to other travellers, it was negligent for her to actively participate in this use of the horse by taking the business in charge and

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directing it with full knowledge of its negligent character. One who actively participates in a negligent use of property, with full knowledge of the danger to third persons, is himself negligent, and he cannot avoid liability by showing that he was assisting the negligent owner as his servant or agent. This ruling requested by the plaintiffs should have been given.

We see no other error in the proceedings. The evidence well warranted a finding that neither of the defendants was personally negligent in failing to discover the defect in the carriage after it came from the shop. It also warranted a finding that the wagon maker was not acting as the servant of either of the defendants in repairing the carriage, but was working under an independent contract which gave him entire control of the business of making such repairs as he thought necessary, for which he was to be paid a reasonable price. The judge might find that, after the carriage was left under the agreement, it could not have been taken away, nor the repairer be interfered with, before the completion of the work, without a breach of the contract. An owner of property is not liable for negligence of a mechanic in doing work under such a contract.

Exceptions sustained.

F. E. Shaw, for the plaintiffs.

W. W. Pyne, for the defendants, submitted a brief.

COMMONWEALTH *vs.* ALBERT S. MADDOCKS.

Essex. November 1, 1910. — December 5, 1910.

Present: KNOWLTON, C. J., HAMMOND, LORING, SHELDON, & RUGG, JJ.

Intoxicating Liquors. Evidence, Of reputation, Presumptions and burden of proof. *Practice, Criminal*, Conduct of trial, Judge's charge.

At the trial of a complaint against a retail druggist, licensed as a pharmacist, for keeping and maintaining a tenement used by him for the illegal sale and the illegal keeping of intoxicating liquors, there was evidence that on a certain day a quantity of liquors was seized in the cellar of the shop of the defendant, and that there were found in the cellar six or seven bottles of ale with straw cover-

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ings upon them and near them on the floor seventy-five or more similar straw coverings without bottles in them. There also was evidence of a sale by the defendant on the same day of half a pint of gin without a physician's prescription. *Held*, that the evidence warranted a finding that one of the purposes for which the defendant kept his shop was to sell intoxicating liquors there illegally, and required the submission of the case to the jury.

At the trial of a complaint for keeping and maintaining a tenement used for the illegal sale and the illegal keeping of intoxicating liquors, where the defendant has introduced evidence that his reputation in the community as to his general character is good, it cannot be said to be error for the presiding judge to allow the Commonwealth to show in rebuttal that the defendant's reputation as to being a law-abiding person in relation to the liquor law is bad; although, if such evidence is allowed to be introduced, the presiding judge must exercise great care to see that the jury do not make use of it as tending to show guilt, but use it merely to meet and nullify, so far as it may have any effect, the evidence of the defendant's good reputation.

At the trial of a complaint for keeping and maintaining a tenement for the illegal sale and the illegal keeping of intoxicating liquors, the counsel for the defendant put in evidence, without objection, the facts that the defendant had lived in the community for thirty years with no complaint ever having been made against him, and that he had a wife and three children. The counsel for the defendant, in his argument to the jury, said, "that he desired to impress upon the jury their responsibility and ask them to take into consideration the fact that this defendant had been in the community for many years with no stain upon his character, that he had a family that would be deeply affected by the outcome of this trial, that the defendant was not saying this by way of begging for mercy but simply to impress upon them the seriousness of the charge, of the probable effect upon the defendant and his family, so that they should realize their responsibility and weigh with the most extreme care the evidence as submitted against the defendant to see whether or not it bore the impress of truth and required them to find the defendant guilty beyond any reasonable doubt." The presiding judge in his charge to the jury instructed them "that any remarks made by the defendant's counsel in regard to the wife and family of the defendant were improper, that it made no difference whether he was a man of standing, whether he had a wife or family or not, that the defendant had no right to argue this proposition to the jury, that the remarks were intended by the counsel for the defendant simply to throw dust in the eyes of the jury and divert their minds from the proper issue in the case." *Held*, that the statement of the judge quoted above in regard to the intention of the defendant's counsel was unwarranted and was prejudicial to the defendant, and that an exception to it must be sustained.

At the trial of a complaint for keeping and maintaining a tenement used for the illegal sale and the illegal keeping of intoxicating liquors, the instructions of the presiding judge to the jury in regard to the burden of proof were very meagre, and the defendant asked the judge to give to the jury the additional instructions, "that they must give the benefit of any reasonable doubt to the defendant, that a greater degree of certainty was required to convict the defendant of a criminal charge than might satisfy the jury in their ordinary business affairs and that if evidence could be explained reasonably upon any other hypothesis than that of the defendant's guilt the jury should find the defendant not guilty." *Held*, that the additional instructions asked for by the defendant embodied correct statements of the law and should have been given.

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COMPLAINT, received and sworn to in the District Court of Eastern Essex on November 26, 1909, charging the defendant with keeping and maintaining a tenement in Gloucester used by him for the illegal sale and the illegal keeping of intoxicating liquors between May 1 and November 26, 1909.

At the trial in the Superior Court before *Raymond*, J., it appeared that the defendant was a retail druggist at Gloucester, licensed as a pharmacist and holding a certificate of fitness, issued under the statute on the subject, authorizing him to sell intoxicating liquors on physicians' prescriptions. The premises consisted of a store and a cellar underneath, the store being an ordinary drug store and equipped as such.

The Commonwealth introduced evidence by two detectives, who testified that the defendant sold to them on the twenty-fifth day of November one half pint of gin without a physician's prescription. There also was evidence from the police officers of the city of Gloucester, who testified as to the seizure of a quantity of liquors from the premises of the defendant on November 25. It was contended by the Commonwealth that the quantity of liquors on the premises was excessive. There also was evidence that there were found in the cellar six or seven bottles of Bass's ale with straw coverings upon them and that there were near by on the floor of the cellar seventy-five or more similar straw coverings. The defendant testified and introduced evidence tending to prove that he did not sell the one half pint of gin to the detectives, that the quantity of liquors seized was not an excessive quantity but was a reasonable and proper quantity to be kept by him, considering the size of the city and the extent of his trade and the number of prescriptions which he was called upon to fill; that the bottles in the cellar were not covered with straw coverings and that the other straw in the cellar was from bottles of Apollinaris water and Poland Spring water and packings of other liquids which he had received in the ordinary course of business.

At the close of the evidence the defendant asked the judge to rule that upon all the evidence the jury could not find the defendant guilty and asked the judge to order a verdict of not guilty. The judge refused to make this ruling or to order such a verdict, and the defendant excepted.

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During the trial of the case the defendant introduced the evidence of several witnesses who testified that the reputation of the defendant in the community as to his general character was good. John Karcher, one of the witnesses who so testified, was asked upon cross-examination by the district attorney as to the reputation of the defendant in the community in regard to the sale of intoxicating liquors. To this question the defendant objected. The judge overruled the objection and the defendant excepted. The witness then answered, "I don't know."

The Commonwealth then called to the stand the county treasurer, David I. Robinson of Gloucester, and asked him the following question: "Do you know what is the reputation of the defendant in the community as to his being a law-abiding person in relation to the liquor law?" To this question the defendant objected. The judge overruled the objection and the defendant excepted. The witness then answered, "I do." The district attorney then asked, "What is it?" To this question the witness answered, "It is bad." To this question and answer the defendant also objected. The judge overruled the objection and the defendant excepted.

It appeared in the evidence produced by the defendant during the trial, without objection, that the defendant had been in the community for thirty years with no complaint ever having been made against him and no objection having been made to his having a druggist's license or a certificate of fitness during all these years, and that he had a wife and three children in Gloucester. The counsel for the defendant argued to the jury "in substance that this was a most important case for the defendant, that the jury should realize in this case as in every other criminal case that the evidence must convince them of the guilt of the defendant beyond any reasonable doubt, that he desired to impress upon the jury their responsibility and ask them to take into consideration the fact that this defendant had been in the community for many years with no stain upon his character, that he had a family that would be deeply affected by the outcome of this trial, that the defendant was not saying this by way of begging for mercy but simply to impress upon them the seriousness of the charge, of the probable effect upon the defendant and his family, so that they should realize their responsibility and weigh

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with the most extreme care the evidence as submitted against the defendant to see whether or not it bore the impress of truth and required them to find the defendant guilty beyond any reasonable doubt, that the same rule of evidence as to proof beyond a reasonable doubt applied in this case as it would even in a case where murder was charged and that the Commonwealth was held up to the same degree of certainty as it would be if the charge was the gravest possible charge in a criminal case."

The judge in his charge to the jury stated to them "that any remarks made by the defendant's counsel in regard to the wife and family of the defendant were improper, that it made no difference whether he was a man of standing, whether he had a wife or family or not, that the defendant had no right to argue this proposition to the jury, that the remarks were intended by the counsel for the defendant simply to throw dust in the eyes of the jury and divert their minds from the proper issue in the case, that the court hoped that the jury would be acute enough to appreciate the purpose of the argument and would consider only such matters as should properly influence their decision."

To these instructions of the judge the defendant objected and asked the judge to modify or correct them. The defendant excepted to these instructions and to the refusal of the judge to amend them.

The judge in his charge to the jury instructed them as to the definition of reasonable doubt substantially as follows: "Of course it is impossible that any case can be proved with mathematical precision or certainty, there is always a balancing of facts upon one side or the other in arriving at a reasonable conclusion upon all the evidence. When the court says that the evidence must satisfy the jury beyond a reasonable doubt as to the guilt of the defendant, it simply means that the jury must be satisfied of his guilt only to that degree of certainty upon which they would be satisfied to act in important concerns of their own."

To this instruction the defendant objected and asked the judge to instruct the jury "that they must give the benefit of any reasonable doubt to the defendant, that a greater degree of certainty was required to convict the defendant of a criminal charge than might satisfy the jury in their ordinary business affairs and that

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if evidence could be explained reasonably upon any other hypothesis than that of the defendant's guilt the jury should find the defendant not guilty."

This ruling or explanation the judge refused to make, stating that he had so frequently explained reasonable doubt to the jury that there was no need to do it again. To the instruction of the judge and to his refusal to amend and explain it the defendant excepted.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

F. H. Tarr, for the defendant.

H. C. Attwill, Assistant District Attorney, for the Commonwealth.

SHELDON, J. 1. There was evidence which required the submission of the case to the jury. They might infer that the coverings discovered in the defendant's cellar had come from bottles with the same contents as those found in the immediate vicinity which were furnished with similar coverings. The quantity of liquors actually upon his premises, with what might thus be found to have been recently disposed of by him, and the fact which also might be found that on the same day he had made an illegal sale of liquor, warranted the inference that one of the purposes for which he kept his shop was to sell illegally intoxicating liquors therein. *Commonwealth* v. *Locke*, 145 Mass. 401. *Commonwealth* v. *McNeff*, 145 Mass. 406. There is nothing in *Commonwealth* v. *Patterson*, 138 Mass. 498, or *Commonwealth* v. *Hayes*, 150 Mass. 506, inconsistent with this.

2. We cannot say that after the defendant had put his general reputation in issue, the Commonwealth might not show in reply that his reputation as to being a law-abiding person in relation to the liquor law was bad, although we intimate no opinion as to the particular question which was excepted to. The introduction of such evidence would of course call for great care on the part of the judge to see that the jury should not use it as evidence of guilt, but should treat it merely as meeting and nullifying (so far as it might have any effect) the evidence of the defendant's good reputation. But it was not incompetent. It was so held in *State* v. *Knapp*, 45 N. H. 148, 157, *Balkum* v. *State*, 115 Ala. 117, and *State* v. *Thornhill*, 174 Mo. 364. See

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the discussion in 1 Wigmore on Ev. §§ 59 *et seq.* The testimony excluded in *Commonwealth* v. *Nagle*, 157 Mass. 554, 555, was as to the defendant's habits and course of action, not as to his reputation itself.

3. It would be difficult to say that the argument addressed to the jury by the defendant's counsel was objectionable. *Commonwealth* v. *Brownell*, 145 Mass. 319, 323. If, in spite of the disclaimer made, it seemed to the presiding judge that there was an effort to appeal unduly to the sympathy of the jury or to divert their attention from the issue, it would be right in charging them to guard against that danger. But it was going altogether too far and was distinctively prejudicial to the defendant to tell the jury that "the remarks were intended by the counsel for the defendant simply to throw dust in the eyes of the jury and divert their minds from the proper issue in the case."

4. It might be possible, if there had been no request for further instructions, to sustain the ruling that the requirement of proof of guilt beyond a reasonable doubt is satisfied by proof to that degree of certainty upon which a jury would act in important concerns of their own. This however falls considerably below the statements which were sustained in *Commonwealth* v. *Leach*, 160 Mass. 542, 546, 551, now relied on by the Commonwealth. And see *Commonwealth* v. *Sinclair*, 195 Mass. 100, 110. But the instructions given were very meagre; and it requires no reasoning and no citation of authorities to show that the additional instructions asked for by the defendant upon this point embodied correct statements of the law and should have been given.

Exceptions sustained.

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CHARLES P. BLINN, JR., & others *vs.* WARREN S. DAME & others.

IRVING L. DAME & another *vs.* CHARLES P. BLINN, JR., & others.

Suffolk. March 18, 1910. — January 2, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, BRALEY, SHELDON, & RUGG, JJ.

Insurance, Life. *Practice, Civil*, Parties. *Assignment*, For the benefit of creditors. *Covenant*, Of further assurance.

Under the provisions of St. 1894, c. 225, now incorporated in St. 1907, c. 576, § 78, a person to whom a policy of life insurance, issued after April 11, 1894, is made payable by its terms may maintain an action upon it in his own name although not a party to the contract of insurance.

Where a general assignment for the benefit of the creditors of the assignor includes all his "estate, property and effects, real, personal and mixed, of whatever name and nature, legal and equitable, . . . also all claims, debts, choses in action, owing to him, whether now or hereafter payable, and all evidences thereof; . . . except such property as is exempt from being taken on execution by law," the exception refers only to the statutory exemptions stated in R. L. c. 177, § 34, and the instrument conveys to the assignee all the property and property rights of the assignor which the creditors could have reached for the satisfaction of their demands by any process, legal or equitable.

A general assignment for the benefit of creditors, which conveys all property of the assignor legal and equitable except such as is exempt by statute from being taken on execution, and expressly includes "all claims, debts, choses in action, owing to him, whether now or hereafter payable," transfers to the assignee a right of the assignor to surrender a policy of life insurance and take the amount of the surrender value for his own benefit.

In a policy of life insurance the insurance company agreed to pay to "the insured, his executors, administrators or assigns," the sum of $10,000 on a certain day, twenty years from the date of the policy, or if he "should die before that time, then to make said payment to" his two children named, "if they survive the insured (with power to the insured to surrender this policy to said company at any time), otherwise to the insured's executors, administrators or assigns." The policy was assignable by the insured, and contained a statement of what the expected surrender value would be at the end of successive years of the proposed insurance. The insured made a general assignment for the benefit of creditors, including all choses in action, and the assignee, having obtained possession of the policy, surrendered it to the insurance company and demanded its surrender value, against the objection of the children of the insured named in the policy and of the insured himself. In suits in equity respectively by the assignee to compel the insurance company to pay to him the surrender value of the policy and by the children of the insured to enjoin such payment, it was *held*, that the right of the insured to surrender the policy at any time for

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its surrender value was a chose in action in existence at the time of the assignment and was a valuable right of property of the assignor which passed to his assignee for the benefit of his creditors; and that it was not necessary to decide whether the interest of the children of the insured was a vested one, because, even if it was vested, it was made subject to termination by the surrender of the policy and had been so terminated by the owner of that right.

An assignment for the benefit of creditors, which transferred to the assignee a right of the assignor to surrender a policy of life insurance and receive from the insurance company the amount of its surrender value, contained a covenant of further assurance, by which the assignor agreed to "make such conveyances, deeds or other instruments, and to do all such acts as shall be requisite or advisable to vest in the [assignee] all and every right, interest, and species of property of the [assignor.]" In a suit in equity brought by the assignee against the insurance company and the assignor, to compel the insurance company to pay to the assignee the surrender value of the policy, it was *held*, that under his covenant of further assurance it was the duty of the assignor to execute in favor of the assignee any instrument of surrender that might be necessary to enable him to collect the surrender value of the policy from the insurance company, and that it was the duty of the insurance company upon receiving a proper surrender of the policy to pay its surrender value to the assignee.

TWO BILLS IN EQUITY, the first bill, filed in the Superior Court on January 8, 1910, by the assignees for the benefit of the creditors of Warren S. Dame, under an assignment in writing made by Dame on August 7, 1909, against him, and Irving L. Dame and Mildred F. Dame, his children, and also against the Penn Mutual Life Insurance Company of Philadelphia, a corporation, praying for a decree ordering the defendant corporation to pay to the plaintiffs the cash surrender value of an endowment life policy for $10,000 issued by that defendant to the defendant Warren S. Dame, the plaintiffs' assignor, and ordering the defendant Warren S. Dame to do all acts necessary to entitle the plaintiffs to receive from the defendant corporation such cash surrender value of the policy, and the second bill, filed in the Superior Court on December 17, 1909, by Irving L. Dame and Mildred F. Dame, the children of Warren S. Dame above named, praying for a decree enjoining the plaintiffs in the first suit from surrendering the policy and the defendant corporation from accepting such surrender, and ordering the defendant corporation to deliver the policy to the plaintiffs.

The cases came on to be heard together before *Richardson*, J., who reserved and reported them for determination by this court, such decree to be entered as equity might require.

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The policy of insurance was dated July 11, 1898, and contained the following provision:

"In consideration of the application for this Bond or Policy hereby made a part of this contract, the Penn Mutual Life Insurance Company of Philadelphia, insures the life of Warren S. Dame of Boston in the County of Suffolk, State of Massachusetts in the sum of Ten Thousand Dollars, and promises to pay at its Home Office, in the City of Philadelphia, unto Warren S. Dame, the insured, his executors, administrators or assigns, the said sum insured on the Tenth day of July in the year nineteen hundred and eighteen; or if the said insured should die before that time, then to make said payment to Irving L. and Mildred F. Dame, children of the insured in equal shares if they survive the insured, (with power to the insured to surrender this policy to said Company at any time) otherwise to the insured's executors, administrators or assigns the said sum insured, upon receipt of satisfactory proof of the death of the insured, during the continuance in force of this Policy, upon the following conditions, namely:" Here followed a provision in regard to the payment of premiums. Other provisions of the policy are mentioned in the opinion.

The assignment for the benefit of creditors under which the plaintiffs in the first suit made their claim was dated August 7, 1909, and contained the following:

"Now therefore the said Warren S. Dame, in consideration of one dollar, to him paid by the parties of the second part, the receipt whereof is hereby acknowledged, does hereby grant, bargain, sell, convey, assign, transfer, set over and deliver unto the said Samuel E. Winslow, Charles P. Blinn Jr. and Charles W. Bailey, and the survivor of them and their and his successors, heirs, representatives and assigns, all the estate, property and effects, real, personal and mixed, of whatever name and nature, legal and equitable, and wheresoever situated, belonging to the party of the first part; also all claims, debts, choses in action, owing to him, whether now or hereafter payable, and all evidences thereof; also any and all other property, real or personal, of or belonging to him, of whatsoever description and wheresoever the same may be, including leases which he has or holds of stores numbered 368 through 370 and 374 Washington Street, in

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said Boston, and including the good-will and any and all trade names used by or in any way connected with the business carried on by him, except such property as is exempt from being taken on execution by law."

It contained also the following covenant:

"The party of the first part hereby covenants and agrees to and with the parties of the second part, the survivor of them and their successors, that he will, on request, give him or them all information in his power respecting the assigned property, and make such conveyances, deeds or other instruments, and do all such acts as shall be requisite or advisable to vest in the parties of the second part, the survivor of them and their successors, all and every right, interest, and species of property of the party of the first part as aforesaid, and to carry into effect the true intent and meaning of these presents."

Later Samuel E. Winslow resigned as an assignee, and the plaintiff Charles L. Alvord was appointed in his place in accordance with provisions of the assignment.

Soon after the execution of the assignment for the benefit of creditors, Warren S. Dame delivered the policy to the plaintiff Charles P. Blinn, Jr., at the request of Blinn, in order that Blinn might submit the policy to counsel for an opinion as to whether or not it constituted an asset to which the assignees for the benefit of creditors were entitled.

The assignees, after inspecting the policy and acting upon the advice of counsel, claimed the title to the policy and the right to surrender it and to obtain its surrender value, and asked the officers of the insurance company what steps they should take in order to obtain its surrender value for the benefit of the creditors who had assented to the assignment, those creditors having claims very much in excess of the value of all the assets of the assignor, even though there should be included in such value the amount of the insurance policy, $10,000. The insurance company notified the assignees that it would pay to them the surrender value of the policy on delivery of a written surrender executed by the assignees and by Warren S. Dame, and the assignees requested Warren S. Dame to join with them in executing such a surrender. This Dame refused to do. The assignees thereupon annexed a duplicate of Dame's assignment to the

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policy and delivered the policy with the assignment attached to the insurance company. The insurance company was notified by Irving L. Dame and Mildred F. Dame, the plaintiffs in the second suit, of their claim to the policy and that they denied the right of the assignees to surrender the policy without the assent of the assignor and his two children.

The foregoing facts appeared from a statement of agreed facts signed by the counsel of the parties and filed in the two cases. It was agreed that the court might draw inferences of fact from the agreed facts stated.

The case was argued at the bar in March, 1910, before *Knowlton*, C. J., *Hammond*, *Loring*, *Braley*, & *Rugg*, JJ., and afterwards was submitted on briefs to all the justices.

C. R. Lamson, (*W. I. Nottage* with him,) for the assignees of Warren S. Dame.

H. LeB. Sampson, for Irving L. and Mildred F. Dame.

SHELDON, J. This policy was issued by the insurance company to Warren S. Dame; the contract of insurance was made entirely between him and the company; the general interest, ownership and right of property in the beneficial stipulations of the policy were vested in him; and before the enactment of St. 1894, c. 225, now contained in St. 1907, c. 576, § 73, any action to recover the amount of the policy must have been brought in his name or in that of his personal representative. *Wright* v. *Vermont Life Ins. Co.* 164 Mass. 302. See *Brown* v. *Greenfield Life Association*, 172 Mass. 498; *Millard* v. *Brayton*, 177 Mass. 533; *Bailey* v. *Wood*, 202 Mass. 562.

The policy was issued however after the St. of 1894, c. 225, had taken effect; and under the provisions of St. 1907, c. 576, § 73, already cited, the limitations made in the policy of its proceeds for the benefit of the children of the insured, who are the plaintiffs in the second suit, are valid and must be enforced in their behalf. If an appointment or settlement has been made upon them by a stipulation in the policy that the amount thereof shall be paid to them, that establishes their right, and their right, once established and brought into being as a vested right, is not to be taken away from them, except as this result shall be found to have been contemplated and provided for by the terms of the appointment itself. We must ascertain therefore the true

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construction of this policy as to the disposition of the amount insured, that is, the construction, considering all the terms of the policy, of the promise contained therein. By that promise the company, reciting that it insures the life of Warren S. Dame, undertakes to pay the sum of $10,000 to him, "the insured, his executors, administrators or assigns," on the tenth day of July, 1918, or if he "should die before that time, then to make said payment to Irving L. Dame and Mildred F. Dame," his children, "if they survive the insured (with power to the insured to surrender this policy to said company at any time), otherwise to the insured's executors, administrators or assigns." The policy was assignable by the insured; and it contained a statement of what the expected surrender value, or the amount to be paid by the company to the insured or his assigns on his surrender of the policy, would be at the end of the successive years of the proposed insurance.

It thus appears that the elder Dame, the insured, had several valuable rights in the policy; and it is difficult to see why his assignment of the policy would not carry with it all his valuable rights, unless we find some restriction in the language of the policy.

1. If he lived until July 10, 1918, he would be entitled to receive the sum of $10,000.

2. If he died before that time, that sum would be payable to his personal representatives and would go to increase the amount of his estate unless his children survived him.

3. At any time during the term of the proposed insurance he could surrender the policy and receive for his own benefit the amount of the then existing surrender value.

The right of his children was to receive the amount of the policy if he did not live until the appointed time and if they survived him and he had not in his lifetime surrendered the policy. If this right is regarded as contingent, it would not come into existence at all if the father should at any earlier time exercise his absolute right to surrender the policy; if their right was a vested one, it would be completely divested by their father's exercise of his right. Their right, in the opinion of the majority of the court, was strictly subordinate to the prior and superior right of their father. It was so made by the very lan-

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guage which created it. Either it was not to arise at all if the paramount right of their father should be exercised, or it would be completely divested by the exercise of his paramount right to surrender the policy. Whether their interest was vested or contingent, they could have no part of the proceeds of the policy if their father lived until its maturity, or if they did not survive him, or if he had at any earlier time surrendered the policy. Unless these three contingencies concurred in their favor, either their right never would vest, or it would be completely divested and cut off by the very terms of the conditional limitations in their favor. We do not deem it material to determine whether their right was vested or contingent; for as we have seen, the result would be the same in either event. There is no question here of the attempted revocation of a trust. Such cases as *Stone* v. *Hackett*, 12 Gray, 227, and *Kelley* v. *Stone*, 185 Mass. 288, and those cases in which an absolute interest was given to beneficiaries of life insurance policies, have no bearing. We are to construe the language of the policy and to determine what rights it gives to the children. The statute which has been referred to protects these rights when ascertained, but it has no operation to increase or extend them.

Under this state of affairs, the elder Dame made his assignment to the predecessors of the plaintiffs in the first action, hereinafter called the plaintiffs. The language of that instrument is broad and sweeping. It passes all his "estate, property and effects, real, personal and mixed, of whatever name and nature, legal and equitable, . . . also all claims, debts, choses in action, owing to him, whether now or hereafter payable, and all evidences thereof; also any and all other property, real or personal, of or belonging to him, of whatever description and wheresoever the same may be, . . . except such property as is exempt from being taken on execution by law." This exception does not cover property which could not be taken on a writ of execution at common law; it manifestly refers only to the statutory exemptions stated in R. L. c. 177, § 34. The instrument, we are satisfied, was intended to convey, and does convey, to the assignees all the property and property rights of the assignor which the creditors could have reached for the satisfaction of their demands by any process, legal or equitable.

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We do not doubt that the right of the assignor under this policy to receive the amount thereof on July 10, 1918, if he shall then be living, and his right to have the same amount paid to his personal representative upon his earlier decease if his children shall not survive him, would have been available to his creditors and would have passed under the assignment, *Anthracite Ins. Co.* v. *Sears*, 109 Mass. 383. *Lord* v. *Harte*, 118 Mass. 271. *Brigham* v. *Home Life Ins. Co.* 131 Mass. 319. *Pierce* v. *Charter Oak Ins. Co.* 138 Mass. 151. *Haskell* v. *Equitable Assurance Society*, 181 Mass. 341. *Alexander* v. *McPeck*, 189 Mass. 34. *Biggert* v. *Straub*, 193 Mass. 77. It seems equally plain that he may not now, as against his assignees, surrender the policy and take the amount of the surrender value for his own benefit. As against the insurance company no doubt he has that right. But it is a right secured to him by his contract with the company, and is a valuable right of property available to his creditors. See the cases last above cited. It is a chose in action which was in existence at the time of the assignment and passed by its terms.

What we have said is also in our opinion decisive upon the only remaining question in the case. His right of surrender was a valuable property right, vested in him by the language of the policy. It constituted an integral part of the value to him or his estate of the policy itself. That pecuniary value would be very much less either to himself or to any one to whom he might transfer his property rights if this unqualified and paramount right of surrender were not secured to him. There was here an agreement on the part of the company to pay the surrender value to him upon his surrender; this was a contract right given to him by the policy, which materially increased its value to him. This was not merely a right to surrender under the third article or the third clause of the eighth article of the provisions attached to the policy. Under the parenthetical clause contained in the promise of the company he had the right to surrender the policy at any time and to receive its surrender value. Moreover this clause was made a part of the conditional limitation or appointment in favor of his children, apparently for the very purpose of saving to him the absolute ownership and control of the policy. The children's right was made subject to his unrestricted right of surrender. This was a valuable

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property right incident to his general right under the policy such as would pass with an assignment of the latter. It now must be held, in the opinion of the majority of the court, that it did pass, with the policy itself, under the general language of the assignment.

We have found no case which seems to us to be quite decisive upon the point raised here, though in some cases the question decided, and in others the reasoning of the courts, approaches it more or less closely. The decisions are not uniform; but the general trend of authority is in favor of our view. See *Atlantic Mutual Life Ins. Co.* v. *Gannon*, 179 Mass. 291; *Travelers' Ins. Co.* v. *Healey*, 25 App. Div. (N. Y.) 53, affirmed in 164 N. Y. 607; *In re Steele*, 98 Fed. Rep. 78; *In re Diack*, 100 Fed. Rep. 770; *In re Boardman*, 103 Fed. Rep. 783; *In re Slingluff*, 106 Fed. Rep. 154; *In re Welling*, 113 Fed. Rep. 189; *In re White*, 174 Fed. Rep. 333; *In re Hettling*, 175 Fed. Rep. 65; *Townsend* v. *Townsend*, 127 Ky. 230.

It follows that under his covenant of further assurance it is the duty of Warren S. Dame now to execute in favor of the plaintiffs any written surrender that may be necessary to enable them to collect the surrender value of the policy in question, and the duty of the insurance company upon receiving a proper surrender of the policy to pay such surrender value to the plaintiffs and in the first case a decree must be entered for the plaintiffs substantially as prayed for. The bill in the second case must be dismissed.

So ordered.

INHABITANTS OF THE COUNTY OF HAMPDEN *vs.* ROBERT O. MORRIS.

Hampden. October 17, 1910.—January 2, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, BRALEY, SHELDON, & RUGG, JJ.

Constitutional Law. Clerks of Courts. Naturalization. Statute, Validity.

By art. 1, § 8, of the Constitution of the United States the making of laws relating to the naturalization of aliens is within the exclusive jurisdiction of Congress.

The amendment of R. L. c. 165, § 31, by St. 1908, c. 253, requiring the clerks of

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the courts in the several counties to pay to the county treasurers the balances in their hands from the amounts received as fees in connection with the naturalization of aliens, after retaining the part of such money actually expended by them for clerical assistance, travel and other expenses while acting under the naturalization laws, is void, because it is in conflict with the law of the United States upon this subject contained in 34 U. S. Sts. at Large, c. 3592.

It seems, that, if the Legislature should provide that the salaries otherwise provided by statute for the clerks of courts should be diminished by the amounts received by them, for their own benefit, under the naturalization laws of the United States, the provision might be enforced.

CONTRACT by the inhabitants of the county of Hampden against the clerk of the Superior Court for that county to recover one half of the amount of the fees received by him in naturalization cases and retained by him under the provisions of the act of Congress of June 29, 1906, (34 U. S. Sts. at Large, c. 3592,) after deducting the amount of the expenses incurred by him in such proceedings in accordance with R. L. c. 165, § 31, as amended by St. 1908, c. 253.

In the Superior Court the case was submitted to *King*, J., without a jury, upon a statement of facts agreed to by the parties. The judge found the facts to be as stated in the statement of facts, and at the request of both parties reported all questions of law arising from the facts as found by him for determination by this court. If the plaintiff was entitled to recover, judgment was to be entered for the plaintiff in the sum of $969.08; otherwise, judgment was to be entered for the defendant.

The case was submitted on briefs at the sitting of the court in October, 1910, and afterwards was submitted on briefs to all the justices.

S. S. Taft, District Attorney, for the plaintiff.

Asa P. French, United States District Attorney, *W. H. Brooks* & *W. Hamilton*, for the defendant.

KNOWLTON, C. J. This is an action for money had and received. The defendant is the clerk of the courts for the county of Hampden, and he has in his hands certain fees received officially for services in connection with the naturalization of aliens. The question is whether he is bound to pay over to the county treasurer the balance in his hands, in accordance with the provisions of the R. L. c. 165, § 31, as amended by the St. 1908, c. 253; or whether his conduct is to be governed by the statute of the United States in regard to the naturalization of aliens.

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The Constitution of the United States provides, art. 1, § 8, that "Congress shall have power . . . to establish an uniform rule of naturalization . . . throughout the United States"; also "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers," etc. It is entirely clear, under this provision, that the Congress has jurisdiction over the subject of the naturalization of aliens, and that this jurisdiction is exclusive. *Chirac* v. *Chirac*, 2 Wheat. 259. *Dred Scott* v. *Sanford*, 19 How. 393, 405. *United States* v. *Wong Kim Ark*, 169 U. S. 649, 700. *Gladhill, petitioner*, 8 Met. 168. *Stephens, petitioner*, 4 Gray, 559, 561.

The act of Congress of June 29, 1906, (34 U. S. Sts. at Large, c. 3592,) is "An Act to establish a bureau of immigration and naturalization, and to provide for a uniform rule for the naturalization of aliens throughout the United States." This contains very full and elaborate provisions covering the whole subject, and makes many new requirements to prevent fraud, and to insure results in the interest of good citizenship. It confers jurisdiction, for the purposes of the act, upon the United States Circuit and District Courts in every State, upon the District Courts for the Territories, upon the Supreme Court of the District of Columbia, and upon all courts of record in any State or Territory having a seal, a clerk, and jurisdiction in actions at law or in equity, or at law and in equity, in which the amount in controversy is unlimited.

If we assume that Congress could not compel the courts of a State to take jurisdiction of matters in regard to which the federal government has the exclusive right to legislate, (see *Kentucky* v. *Dennison*, 24 How. 66, 107; *Ex parte Virginia*, 100 U. S. 339, 348; *Stephens, petitioner*, 4 Gray, 559, 562,) there is no doubt that such courts, at least with the consent of the Legislature of the State, may exercise this jurisdiction if it is conferred upon them by a law of the United States. *Gladhill, petitioner*, 8 Met. 168. *Stephens, petitioner*, 4 Gray, 559, 561. *Levin* v. *United States*, 128 Fed. Rep. 826; *S. C.* 63 C. C. A. 476. *Robertson* v. *Baldwin*, 165 U. S. 275. *United States* v. *Nisbet*, 168 Fed. Rep. 1005. *State* v. *Libby*, 47 Wash. 481.

In this Commonwealth the Superior Court has been exercising jurisdiction of this kind since the passage of the act of Congress

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of 1906, as well as before, and the St. 1908, c. 253, seems to give legislative consent to this action of the court.

It is plain, however, that the jurisdiction must be exercised under and in conformity with the federal statute. All the authority of the court is derived from that statute, and no proceedings can be taken by the State court or by any officer of it in a case of naturalization, that is at variance with the statute. As to all matters that enter directly into the subject of naturalization, this is too plain for argument. It is equally true of all matters of legislation by Congress that are fairly incidental to the exercise of the power given by the Constitution to deal with this subject.

The fees prescribed by the federal statute are not all the same as those prescribed by the law of Massachusetts under which naturalization was previously conducted. The disposition of the fees is not the same under the two statutes, and the methods of procedure are very different. As all authority for action is derived from the federal law, this authority permits only such action as that law prescribes. The fees must be regulated by that law, and unless the disposition of them is a matter not fairly belonging to the general subject referred to in the Constitution, the disposition of the fees must also be as therein provided. We are of opinion that the disposition of the fees, as well as the amount of them, may properly be regulated by congressional legislation, as incidental to the establishment of a system with a view to the accomplishment of good results. Under this federal statute the clerks of the courts are required to account to the Bureau of Immigration and Naturalization for one half of the fees collected by them, and to pay them over to the disbursing clerk of the Department of Commerce and Labor; and the other half the clerks may retain for themselves, first paying from these fees all additional clerical force that may be required in performing the duties imposed by the act. There are additional provisions for special conditions, such as the collection of fees in excess of $6,000 in one year, which we need not consider.

The law of Massachusetts (St. 1908, c. 253) requires that all fees received by the clerk in naturalization cases, except sums expended for additional clerical assistance, shall be paid over to the county treasurer. This statute is in conflict with the federal

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law, and in our opinion must yield to it. This has been expressly decided by the Superior Court of Utah in a similar case. *Eldredge* v. *Salt Lake County*, 106 Pac. Rep. 939.

If the courts or Legislature elect to exercise the jurisdiction conferred by the federal statute, they must exercise it upon the terms and with the limitations stated in the statute. We assume that they may decline to exercise it at all; but, if they choose to exercise it, they cannot depart from the statute in any particular upon which it is within the constitutional power of Congress to legislate. The amount of the fees to be charged is a proper subject for congressional regulation. So too, in our opinion, is the disposition of the fees. Congress well might require a part of them to be paid into the treasury of the United States, where they would be available for the payment of a part of the expenses of maintaining the bureau. It cannot reasonably be contended that a State can take these fees away from the government of the United States. Congress well might think that the elaborate proceedings required by the statute impose such duties upon clerks of the courts that the interests of the public will be promoted by giving them special compensation to be taken from the fees. As this is the policy of the law under which the court is acting, the Legislature cannot nullify the statute by enacting that the clerk shall pay all the money to the county treasurer. *Farmers & Mechanics' National Bank* v. *Dearing*, 91 U. S. 29, 31. *Davis* v. *Elmira Savings Bank*, 161 U. S. 275. *Central National Bank* v. *Pratt*, 115 Mass. 539. *Griswold* v. *Pratt*, 9 Met. 16. *Parmenter Manuf. Co.* v. *Hamilton*, 172 Mass. 178.

The St. 1908, c. 253, relied on by the plaintiff, and other similar statutes, have for their object the limitation of the compensation of the clerks for all official services to the salaries prescribed by law. If the Legislature had seen fit, in reference to the fees for services in naturalization cases, to declare that the statutory salary elsewhere provided should be diminished by the amount received as fees in proceedings for naturalization, the provision might have been enforced. But the statute before us is not of this kind. It does not assume to change the salaries, but attempts to deal directly with the fees received under the law of the United States. In this respect it goes beyond the power of the Legislature. *Judgment for the defendant.*

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WILLIAM H. GILE & others *vs.* GEORGE H. PERKINS & others.

Essex. November 3, 1910. — January 2, 1911.

Present: KNOWLTON, C. J., HAMMOND, LORING, SHELDON, & RUGG, JJ.

Municipal Corporations. Assessors. Tax, Assessment.

A town has no authority to expend money to pay its assessors for work done, after they have completed the assessment in a certain year, in preparing a new valuation of the taxable property of the town with a view to its publication and its subsequent use by the assessors in making the assessment in the following year.

Whether in a year in which the assessors of a town are obliged to do an unusual amount of work in making the valuations required and contemplated by the statutes, it would be reasonable for the town under R. L. c. 12, § 99, to add to the compensation which the statute gives them for their services, here was referred to as a question which did not arise in the present case.

BILL IN EQUITY, filed in the Superior Court on October 8, 1910, under R. L. c. 25, § 100, by ten taxable inhabitants of the town of North Andover, to enjoin the assessors of that town from making a second valuation in the year 1910 of the real property in the town and to restrain the town treasurer from paying any money for expenses incurred in making such second valuation.

The case came on to be heard before *Richardson*, J., who by agreement of the parties reserved and reported the evidence and all questions of law thereon for determination by this court.

N. P. Frye, for the plaintiffs.

J. P. S. Mahoney, for the defendants.

KNOWLTON, C. J. It appears from this record that the assessors of the town of North Andover made a valuation of all the taxable property of the town as of April 1, 1910, and assessed the taxes in accordance therewith and committed their warrant for the collection thereof to the tax collector. It is fairly to be inferred that on or about the first day of October of that year they deposited with the tax commissioner a copy of their valuation books as required by the St. 1909, c. 490, Part I. § 60, and a copy of the table of aggregates from the lists of valuation and assessments, as required by § 59 of that chapter. They seem to

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have performed all their regular official duties for the year 1910. It also appears that after completing this assessment they set to work to prepare a new valuation of the taxable property of the town, with a view to its publication. It is not suggested that any use was expected to be made, or could be made, of this intended valuation in the assessment of taxes for the current year, for that assessment had already been completed. Such a valuation cannot be made the basis of taxation for the next year, or for any time thereafter; for under the statute a new valuation must be made by the assessors as of April first in each year. The proposed valuation cannot be returned to the tax commissioner under the statute, for it is not a valuation upon which the annual assessment is made or can be made. The reason for attempting to make it seems to have been that, because of the labor and the practical difficulties involved, the last valuation and former valuations were incorrect and incomplete, and the valuation upon which the next assessment is to be made ought to be different. So it was thought to be convenient to do work and publish results that might be used by the assessors in the next year, to save a part of the labor that otherwise would be involved at that time in making a correct valuation as of April 1, 1911.

At a meeting of the inhabitants of the town held in March, 1910, an appropriation of $750 was made for the assessors' department, which is conceded by the parties to cover the compensation of the assessors for the performance of their regular official duties in making the usual valuation and assessing the taxes. An appropriation of $1,500 was also made for "taking the valuation." In view of the action of the assessors and of the town in making and publishing a similar valuation in the years 1860, 1870, 1880, 1890 and 1900, it may fairly be assumed that this appropriation was intended to cover the expenses of preparing and publishing such a valuation as the assessors have lately been attempting to make; so we come to the question whether this is an expenditure that the town can lawfully incur.

All the provisions for taxation and for valuing property as a basis for it are statutory. The machinery and the methods of using it are prescribed with great particularity. If these methods are rightly followed, everything will be accomplished

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that needs to be done for the proper assessment of taxes. The business is put in the charge of public officers whose duties are carefully defined. Nothing is left to be done by cities or towns, outside of the channels which lead directly to the desired outcome. Nor is there occasion for direction by a city or town to the assessors themselves to perform other duties than those that pertain directly to their office, for the purpose of promoting a just and legal assessment of taxes. The whole subject is covered by legislation. *Cox* v. *Segee*, 206 Mass. 380. *Welch* v. *Emerson*, 206 Mass. 129.

The evidence indicates that in connection with the next annual assessment more work should be done by the assessors to make the valuation such as the statute contemplates, than they have been accustomed to do in recent years. Whether it would be reasonable for the town to add to the compensation which the statute gives them for their services, is a question which does not arise in this case. See *Welch* v. *Emerson*, *ubi supra*. But for reasons above stated we are of opinion that the town, under the circumstances disclosed by this record, cannot legally expend money under the votes in question for the purpose of taking this valuation.

It does not appear that the plaintiffs have been guilty of laches.

Writ of injunction to issue.

OLD COLONY STREET RAILWAY COMPANY *vs.* HIRAM W. PHILLIPS.

Norfolk. January 19, 1910. — January 3, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, BRALEY, SHELDON, & RUGG, JJ.

Easement. Way, Private. *Deed. Flats. Land Court.*

Discussion by HAMMOND, J., of the rights under the colonial ordinance of 1647 of the public and of the owner of flats between high and low water mark adjacent to an arm of the sea.

It is to be assumed that the phrase "together with a privilege or passage way from said Creek into Town River," in a deed made in 1834 conveying a tract

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of land bounded on the south by a highway and on the north by the centre of a creek lying just below high water mark in flats which extended a long distance to Town River, an arm of the sea, was intended to confer upon the grantee a right which otherwise he would not have had.

The owner of a tract of land, bounded on the south by a highway and on the north by an arm of the sea called Town River, and containing within its area upland by the highway, and flats between the upland and low water mark of the arm of the sea, which a "Creek," so called, which was dry at low tide, crossed from east to west just below high water mark, in 1834 conveyed to a shipwright a portion of the tract, bounded on the south by the highway and on the east and north by a line described in the deed as follows: "Thence northerly . . . to a stake in the centre of a creek. Thence easterly along the centre of said Creek. . . ." The deed after the description read as follows: "Together with a privilege or passage way from said Creek into Town River." Access to Town River from the land so conveyed to him, upon which he built a shipyard and plied his trade, was necessary to the shipwright in his business. In 1907, one who had become the owner of the remaining flats petitioned in the Land Court to have his title registered. The judge of the Land Court, subject to an exception by the petitioner, ruled that the "passage way" named in the deeds "was intended to be a way by water from the creek out to the river." *Held*, that the language of the deed to the shipwright granted a right of passage over the flats, whether bare or covered with water, at any and all times and by any reasonable method of travel, which was an easement appurtenant to the land conveyed by the deed.

A phrase in a deed, "together with a privilege or passage way [over certain flats lying between high and low water] from said creek into" an arm of the sea, is not void for indefiniteness if the uses intended by the parties can be adjudged by the aid of the circumstances, although the limits or location of the way have not been determined by the parties by a use or otherwise, because under such circumstances the location must be governed by what is reasonable, which may be judicially determined without adding to the grant.

The owner of a tract of land, bounded on the south by a highway and on the north by an arm of the sea called Town River, and containing within its area upland by the highway, and flats between the upland and low water mark of the arm of the sea, which a "Creek," so called, which was dry at low tide, crossed from east to west just below high water mark, in 1834 conveyed to a shipwright a portion of the tract, bounded on the south by the highway and on the east and north by a line described in the deed as follows: "Thence northerly . . . to a stake in the centre of a creek. Thence easterly along the centre of said Creek. . . ." The deed after the description read as follows: "Together with a privilege or passage way from said Creek into Town River." Access to Town River from the land so conveyed to him, upon which he built a shipyard and plied his trade, was necessary to the shipwright in his business. In 1888 the heirs of the shipwright, by a deed containing the same description and language, conveyed the parcel to a diver, who used it in connection with his business, to the conduct of which access to the arm of the sea over the flats north of the creek was necessary. The creek dried up. In 1907 one who had become the owner of the remaining flats petitioned in the Land Court to have his title registered. The judge of the Land Court, subject to an exception by the petitioner, ordered a decree that the title to the petitioner's flats be registered "subject to a right in favor of" the diver to a way by water from the creek out to the river. *Held*, that the existence of the easement was not affected by the drying up of the

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creek, which was referred to merely as a boundary, nor by the fact that the land was no longer used as a shipyard, since the easement was not confined to such a use.

In the absence of any controlling reason to the contrary, a right of way, granted in the following phrase after the description in a deed, "together with a privilege or passage way [over certain flats lying between high and low water] from said creek [just below high water] into" an arm of the sea, must be by the straightest and most direct way, and, whether it be by land or sea, it must be by or over the same land and within the same lines.

A judge of the Land Court, before whom was heard a petition for the registration of the title to certain flats, at the hearing of which the petitioner contended that the language of a certain grant of a right of passage over the flats gave only a right of passage on foot at low tide, and that a passageway by water could not be the subject of private grant, ruled that the passageway "was intended to be a way by water," and ordered a decree that the title be registered "subject to a right . . . as recited in" the deed. The petitioner excepted "because the decree is indefinite as to the limits of and uses of the said right of way." This court, having determined that the right of passage over the flats granted by the deed was at any and all times by any reasonable method of travel and whether the flats were bare or were covered by water, *held*, that the order for a decree was not intended to state in detail the full terms of the final decree as it should thereafter be drawn, nor was the ruling that there was a way by water to be regarded as a statement of the whole nature of the easement, but merely as a ruling upon the feature of it which was in dispute, leaving the details to the future action of the court; and that, thus interpreted, the order was valid.

PETITION, filed in the Land Court on February 4, 1907, for the registration of the title to certain flats at Quincy Point, so called, in Quincy, represented as within the lines W X Z Y on a plan annexed to the bill of exceptions, a copy of which is printed on the opposite page.

The case was heard in the Land Court by *Davis*, J. It appeared that in the year 1834 one Jenkins was the owner of certain upland and flats shown on the plan. The judge found that the easterly boundary of the land and flats owned by Jenkins was the line marked "Vinal-Jenkins Line," that is, the line CD, and that Jenkins, so far as material to this case, owned all the land and flats west of it, so far as represented on the plan.

Town River, as shown on the plan, is an arm of the sea. The plan shows the line of extreme low water, the line of mean low water, and the line of high water. Between the low water lines and the high water line are flats, which are entirely bare at low water and are covered by the sea at high water. There is a very small channel or stream which runs from the extreme southwest corner of the cove marking the line of what was for-

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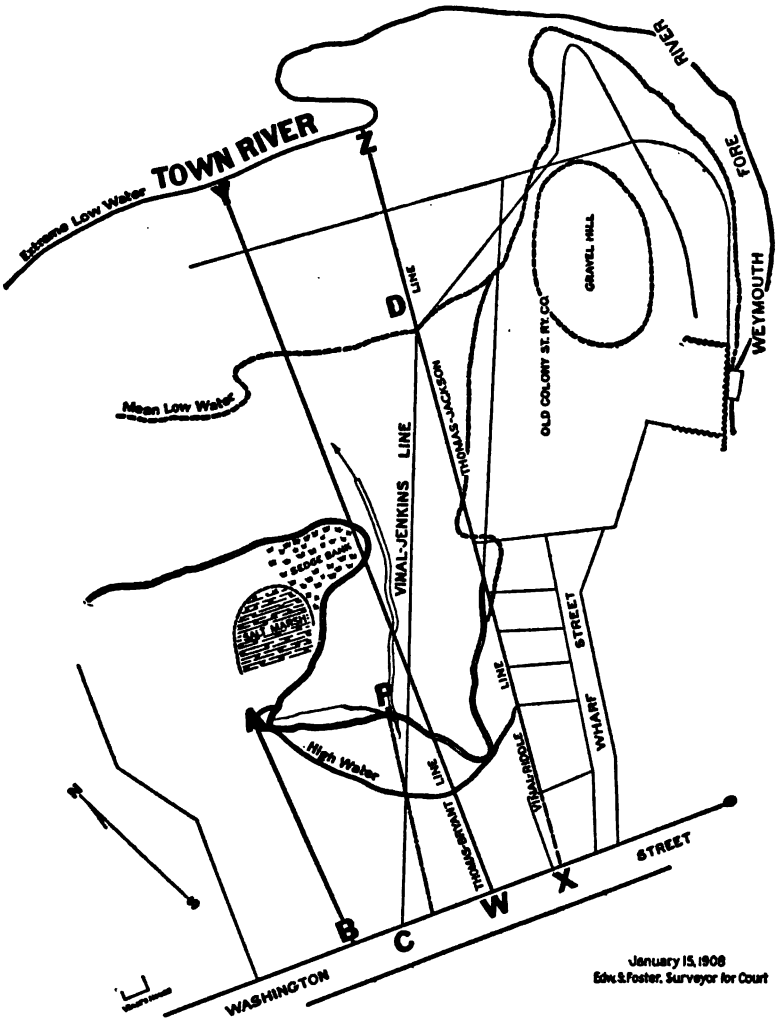
merly a small creek in a general easterly direction to about the middle of the cove, and thence running out northerly to Town



River. This small channel also is probably entirely dry at extreme low water. At all events it does not constitute a channel sufficient to form a limit to the extent of private ownership in the flats.

In the year 1834 Jenkins conveyed to one Jones by a warranty deed the tract of land shown on the plan as bounded

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southerly by Washington Street, westerly by the line AB, northerly by the line AP or a projection thereof, and easterly by the Vinal-Jenkins line, so called, the exact location whereof is in dispute. The easterly and northerly bounds read as follows: "Thence Northerly twenty-six Rods to a Stake in the Centre of a creek. Thence Easterly along the Centre of said Creek." Following the description in the deed was the phrase, "together with a privilege or passage way from said Creek into Town River so called."

In 1888 the heirs of Jones conveyed the same land to the respondent Phillips by deeds, which after the description contained the following clause: "containing about one and one-half (1½) acres, more or less, together with a privilege or passageway from said creek into Town River, so called. Being the same premises described in" the deed from Jenkins to Jones.

Jones was a shipbuilder, and access to the river from this tract was necessary to the business of shipbuilding thereon.

Against the petitioner's objection the judge ruled as follows: "It seems clear to me, however, and I rule that the passageway [referred to in the deed from Jenkins to Jones] was intended to be a way by water from the creek out to the river." The judge therefore ordered a decree that the title to the petitioner's flats be registered "subject to a right in favor of the Phillips estate as recited in the deed from Jenkins to Jones." The petitioner alleged exceptions.

Other facts are stated in the opinion.

The case was argued at the bar in January, 1910, before *Knowlton*, C. J., *Hammond*, *Braley*, *Sheldon*, & *Rugg*, JJ., and afterwards was submitted on briefs to all the justices.

W. A. Rollins, for the petitioner.

W. S. Pinkham, for the respondent.

HAMMOND, J. This is a petition for the registration of title to certain flats in Quincy; and the case is before us upon exceptions taken by the petitioner to the ruling of the Land Court that the passageway named in the deed from Jenkins to Jones "was intended to be a way by water from the creek out to the river," and to the order that "the title to petitioner's flats be registered 'subject to a right in favor of the Phillips estate as recited in'" that deed. The flats are shown upon a plan annexed to the bill

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of exceptions, and the bill recites that reference may be made to it as well as to all the other papers in the case including a copy of the written decision of the Land Court. This last paper is a typewritten document of seventeen pages, setting forth in considerable detail the contentions of the parties at the hearing as to the various questions of law and fact involved, as well as the decision of the court thereon. The so called grounds of the exceptions to the ruling and order are first, that "the words in said deed from Jenkins to Jones did not give a right of way by water from the creek out into the river"; second, that "the respondent Phillips has no right of way by water over petitioner's flats"; and third, that "the decree is indefinite as to the limits of and uses of the said right of way."

1. As to the ruling. One of the contentions of the petitioner is that the attempted grant was void because in law there is no such thing as a grant of way through tidal water. But this objection proceeds upon an entire misconception of the right granted. The phrase which calls for construction follows immediately the description of the land conveyed in fee and reads thus: "together with a privilege or passage way from said Creek into Town River."

Of the land conveyed by the deed the southern portion was upland bounded on the south by a highway, and the northern portion was flats adjoining the upland and bounded on the north by the centre of a creek. This creek was dry at low tide and therefore did not mark the limits of riparian ownership of the flats. Extending from the creek northerly to the low water mark of Town River, in which the tide ebbed and flowed, was a large extent of flats owned by Jenkins at the time of the delivery of his deed to Jones. By virtue of the colonial ordinance of 1647, Jenkins as such owner was vested with the title in fee, with full power to reclaim the flats by building upon them or inclosing them; but he held the fee subject to a general right of the public for navigation until his land was built upon or inclosed, and subject also to the restriction that, unless permitted by some public authority, it should not be built upon or inclosed in such manner as to cut off wholly the access of his neighbors to their houses or lands. *Commonwealth* v. *Alger*, 7 Cush. 53, 78. *Davidson* v. *Boston & Maine Railroad*, 3 Cush. 91, 105. *Henry* v. *Newbury-*

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port, 149 Mass. 582, 586. During a certain portion of every twelve hours these flats were bare, and during the rest of the time they were covered with water of varying depth. Before the deed Jones as one of the public had the right to navigate over these flats; and after the deed, even if there had been no special mention therein of any privilege or passageway, he still would have had this public right, and he would have had the right also of a riparian proprietor that, except by public authority, his access to the river or sea from his land should not be wholly cut off by buildings or inclosures upon the flats. But neither before the deed nor (in the absence of provision therein to the contrary) after the deed, would he have had the right, either as one of the public or as a riparian proprietor, to pass over the flats when bare (except they be reached without trespass and then only for a limited purpose) or in any other way than by water conveyance. See *Weston* v. *Sampson*, 8 Cush. 347. And even the right to navigate was not absolute. So far as it was a public right the owner of the flats could destroy it by buildings and inclosures, and it stood only so far as it was a riparian right. See the note to *Commonwealth* v. *Roxbury*, 9 Gray, 451, on pages 519, 520, and cases there cited. In the deed Jones is described as a "shipwright," and the Land Court has found that he was a shipbuilder and that "access to the river from . . . [the land described in the deed] . . . on which he had his shipyard was necessary in his business."

Under these circumstances what is the fair construction of the phrase "together with a privilege or passage way from said Creek into Town River"? What did the parties mean? It is to be assumed that they meant something, that the phrase was intended to confer upon the grantee a right which otherwise he would not have had.

There is nothing in the deed expressly limiting the right to any particular time or to any particular method of travel. The parties were thinking of a passageway from the land described in the deed to the low water mark of the river, — a passageway over land which by the operation of natural laws was bare or substantially bare during a considerable part of every twelve hours, and during the rest of the time was covered with water of varying depth, a part of the time capable of being navigated.

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If the passage was only by land or if it was only by water, then in either case during a considerable part of every twelve hours it was not available. The language of the deed is broad and comprehensive and must be held to describe a right of passage over the flats, whether bare or covered with water, at any and all times and by any reasonable method of travel. The passage may be by walking on the bare flats, by wading when practicable, or by boat when convenient. The easement is not through public waters as such, but is over land; and that is so whether or not the land is covered with water and whether or not the public have also another and different right to pass through the water. It is an easement over land in fee owned by the grantor. It interferes with no right of the public, and we see no reason why it may not be valid in law as between the parties to the deed and their privies in interest. Suppose the owner of the fee of the bed of a private natural pond should grant a way over a part of the bed, could it be successfully contended that the grantee could not pass over the way in a boat provided always he keep within the lines of his way? See *Commercial Wharf* v. *Winsor*, 146 Mass. 559, for a discussion of some principles of the law on the general subject.

It is further urged that the attempted grant is void for indefiniteness. In support of this it is urged that the deed makes no express mention of the limits of the way, or of its precise location, or of the purposes for which it may be used, and that these deficiencies cannot be supplied by judicial construction. This contention however is untenable. By the aid of the circumstances the court can adjudge the uses intended by the parties; and when the limits or location of the way have not been determined by the parties by a use or otherwise (see *Bannon* v. *Angier*, 2 Allen, 128), then the rule is that in those respects the location shall be reasonable and what is reasonable may be judicially determined. The deed therefore conveyed a valid right, and this right was not a mere license, but was an easement appurtenant to the land conveyed by the deed.

The language of the deed is that the passage is from the creek, and it is suggested by the petitioner that the land conveyed did not include the creek and hence that the easement was not appurtenant to the land conveyed. But the northerly

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line of the land conveyed is the centre of the creek and the passageway must be held to start from the boundary line. The easement must be held to be not only over the remaining flats of the grantor Jenkins, but also appurtenant to the land conveyed by the deed.

It is next urged that even if there ever was a right of way through the water it has been extinguished, first, because the creek, i. e. the dominant tenement, has dried up, and second, because the premises are no longer used as a shipyard. But, as has been just stated, the dominant tenement is not the creek but the land conveyed by the deed; and while the fact that the dominant estate was used as a shipyard has a bearing upon whether a passageway by water was intended, the easement cannot be held to be solely for the use of the land as a shipyard. And in the written opinion of the Land Court it appears that "in 1888 the respondent Phillips purchased the Jones tract [the dominant estate] and has used it ever since in connection with his business as a diver, bringing in vessels and lighters at high water clear up to his upland, and anchoring and wintering them in the cove where at low water they are high and dry. Access to the river over the flats north of the old creek, which marks the northerly limits of his ownership, is necessary to his business." It cannot be said that the easement has been extinguished. Nor does there appear to have been at any time an abandonment of the easement by non-user or otherwise.

But this right of passage must be fairly construed. In the absence of any controlling reason to the contrary, and in this case we see none, the passage must be by the straightest and most direct way. And the way by water cannot be such as a sailboat would take when beating against a head wind. Whether the passage be by land or water it must be over the same land, and within the same lines. Such is the general nature of the right granted by the deed. It is valid in law and still exists as an easement in favor of the land conveyed by the deed over the flats between that and Fore River. The exception to the ruling must be overruled.

2. As to the order for a decree. The order was that there should be a decree that "the title to the petitioner's flats be registered 'subject to a right in favor of the Phillips estate as

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recited in the deed from Jenkins to Jones.'" To this order the petitioner excepted "because the decree is indefinite as to the limits of and uses of the said right of way." It is to be noted that the order is not a final decree, nor can it be considered as intending to state in detail the full terms of the final decree as it shall thereafter be formally drawn. To get at its significance it is well to recur to the proceedings in the Land Court which led up to it.

Although the petitioner has argued before us that the attempted grant of the right of way, whether it be by land or water, was void for indefiniteness, it does not seem to have taken in the Land Court that sweeping position so far as respects the way by land. On the contrary, as appears from the written decision of that court, the petitioner argued "that the way provided . . . was a way on foot and at low tide only; and that a passageway by water cannot be the subject of private grant." The only thing really in dispute was whether there was a way by water; and this view of the attitude of the petitioner in the Land Court is supported by the grounds of the exceptions to the ruling as they are set forth in the bill of exceptions.

The order for a decree therefore is not to be interpreted as an order that the decree shall be as narrow as the ruling and refer only to the water way. Under these circumstances the ruling of the court that there was a way by water is to be regarded not as a statement of the whole nature of the easement, but merely as a ruling upon that feature of it which was in dispute.

It was simply an adjudication that by the deed in question a valid easement was created in favor of the land therein conveyed over the flats of the petitioner, and that the easement still exists as thus created. And except as thus adjudicated it left the details of the decree to the future action of the court. As thus interpreted the order was valid.

It would appear from the end of the last paragraph but one of the written opinion of the Land Court * that it was the purpose of that court to describe in the final decree the general nature of the easement but not the way in which it may be exercised.

* The language referred to was as follows: "Just how this way or right can be exercised is not within the jurisdiction of this court, or the limits of this case."

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But whether that be so or not, it is manifest that the question whether the final decree as hereafter drawn will be objectionable because too indefinite or for any other reason cannot now be determined.

Exceptions overruled.

EDWARD G. PARROT & another *vs.* MEXICAN CENTRAL RAILWAY COMPANY, Limited.

Suffolk. March 8, 1910. — January 3, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, BRALEY, SHELDON, & RUGG, JJ.

Agency, Scope of authority, Proof of authority. *Railroad*, Authority of officers. *Practice, Civil*, Rulings at former trial, Refusal to order verdict, Exceptions. *Evidence*, Proof of foreign law, Presumptions and burden of proof, Opinion. *Contract*, Consideration, Performance and breach.

In an action of contract against a corporation operating a railroad in a foreign country, to recover for the breach of an alleged agreement to pay the reasonable expenses incurred by the plaintiff for the production of a book to be called a sportsman's guide book of the foreign country, the plaintiff introduced evidence of an oral agreement to the effect alleged made with the plaintiff in behalf of the defendant by the defendant's general passenger agent and its passenger traffic manager in the foreign country, and the defendant contended that neither of these persons had authority to make the oral agreement sued upon. In answers of the defendant's vice president to interrogatories filed by the plaintiff, there was evidence, that the defendant's general passenger agent was held out to the public as being such an agent by the use of his name on letter heads and otherwise, that his duties "were to exercise direct charge over the work of soliciting and securing passenger traffic for the road, and to make arrangements for that purpose," that the proposed guide book was intended to "make known and popularize the hunting and fishing regions" along the line of the railroad, that the defendant, before the alleged contract with the plaintiff, had planned to publish a similar guide book at its own expense and had advertised in various newspapers and magazines, the contracts for such advertising having been made by the defendant's general passenger agent and its passenger traffic manager, and that the duties of the passenger traffic manager "were generally to supervise the work of the passenger department." There was evidence tending to show that these two men represented the defendant generally at the head of its passenger department, that their duties could not be performed properly without the frequent expenditure of substantial sums of money, and that the advertising department was included in their charge. The vice president testified in his answers that these two agents contracted for advertising and had authority to give in return for it a certain amount of free or reduced transportation over the defendant's lines, but that neither of them had authority to make any contract for any purpose that involved the expenditure of money without

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first having obtained special authority from an executive officer of the corporation. *Held*, that the jury might disbelieve the testimony of the vice president as to the limitation upon the authority of the two agents, or, if they believed the testimony, yet the requirement testified to that the agents should obtain permission from an executive officer before expending any money was in the nature of a secret limitation of the general authority that these agents were held out as possessing, and was not binding upon persons dealing with them in good faith in reliance upon their ostensible authority, so that there was evidence for the jury of the authority of the two agents to make the oral agreement relied upon by the plaintiff.

Where at the first trial of a case in the Superior Court the presiding judge discharges the jury and orders that the case be continued, and, after interrogatories have been filed by the plaintiff and have been answered in behalf of the defendant, the case is tried again before another judge, the presiding judge at such second trial is not bound by any intimations or expressions of opinion of the judge at the first trial.

Where in an action of contract the presiding judge refuses to rule that the defendant committed no breach of contract and refuses to order a verdict for the defendant, and does not ask the defendant's counsel to point out more particularly the propositions of law upon which he relies, it is open to the defendant upon exceptions to raise in this court a question of law actually involved in the refusal of the requests which was not referred to or thought of by the judge or the counsel at the trial.

In an action for the breach of an alleged contract, the plaintiff relied on an oral agreement to pay the plaintiff the amount of certain expenses to be incurred by him for the benefit of the defendant, which was made in the Republic of Mexico, a country which has not inherited the common law of England, and no evidence was introduced of what was the law in Mexico. The defendant contended that there was no presumption in regard to the law of such a foreign country, and therefore that the plaintiff could not prevail because this court could find no rule of law applicable to the case. *Held*, that there is a general presumption of fact that a contract, like that sued upon, to pay money for a valuable consideration creates a liability in all civilized countries, which is sufficient to entitle a plaintiff to recover upon proving his case as alleged, without any evidence as to the law of the place where the contract was made.

Cases cited by KNOWLTON, C. J., supporting the general rule in this Commonwealth, that a promise to pay one for doing that which he is under an existing duty to do is not binding for want of a consideration, and also cases illustrating the limitation of that rule established in this Commonwealth, that a promise to pay one for completing a contract which he has proposed to break is binding, with the remark that this limitation should not be extended beyond the cases to which it is applicable upon the recognized reasons that have been given for it.

In an action against a railroad corporation for the breach of an alleged agreement to pay the plaintiff the reasonable expenses incurred by him for the production of a guide book intended to make known the shooting and fishing regions along the line of the defendant's railroad, the plaintiff introduced evidence of an oral agreement made in behalf of the defendant by certain of its agents who could have been found to have authority to make it, promising to pay the plaintiff the amount of the expenses in question. There also was evidence that at the time this alleged oral agreement was made there was in existence an agreement in writing made by the plaintiff with a person purporting to act for the defendant, by which the plaintiff agreed to produce the guide book in question on certain

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terms, but the defendant denied, both by the general denial in its answer and in the testimony of its vice president in response to interrogatories, that the person who made the agreement in writing had authority to make a contract of that character in behalf of the defendant. The defendant contended in this court that there was no consideration for the oral agreement relied upon by the plaintiff because when it was made the plaintiff already was bound to produce the guide book by the previous agreement in writing. *Held*, that it could not be assumed as matter of law that the contract in writing was made with authority from the defendant, and that, if the jury should find that the making of the contract in writing was not so authorized, they might find that an oral agreement was made later which adopted and included the provisions that previously had been reduced to writing, and that then for the first time a binding agreement was made between the plaintiff and the defendant's representatives acting with authority from the defendant, so that there would be no question of want of consideration.

In an action against a railroad corporation for the breach of an alleged agreement to pay the reasonable expenses incurred by the plaintiff in the production of a guide book intended to make known the shooting and fishing regions along the line of the defendant's railroad, the defendant contended that the plaintiff could not recover because he had not completed the performance of his contract. There was evidence that the defendant agreed to provide for the expenses incurred by the plaintiff in the prosecution of the work, that an agent of the defendant, with authority to do so, told the plaintiff to send the bill for his personal expenses to him, that the plaintiff incurred large expenses, and that the defendant, although requested, refused to pay the plaintiff any money and denied its liability to pay anything or to make any provision for the payment of the expenses. *Held*, that the acts of the defendant justified the plaintiff in refusing to go on with his contract and suing the defendant for damages.

In an action against a railroad corporation for the breach of an alleged agreement to pay the reasonable expenses incurred by the plaintiff in the production of a guide book intended to make known the shooting and fishing regions along the line of the defendant's road, the defendant should not be allowed to ask its agent, who made a contract with the plaintiff in regard to the production of the guide book, expecting the answer "No," the question, "Did you yourself have authority to spend any money for advertising purposes?," because the question calls for a conclusion of the witness as to the effect of his relations with the defendant and not merely for facts which would show whether he had authority.

In an action against a railroad corporation for the breach of an alleged agreement to pay the reasonable expenses incurred by the plaintiff in the production of a guide book intended to make known the shooting and fishing regions along the line of the defendant's road, the plaintiff relied upon an oral agreement made in behalf of the defendant by two of its agents whose authority to make it was denied by the defendant. The plaintiff filed interrogatories addressed to the defendant, which were answered by its vice president. The presiding judge made rulings in regard to the answers to the interrogatories, which, when rightly interpreted, were in substance, that the answers were evidence of the facts tending to show the authority or the want of authority of the agents, but were not evidence so far as they stated the opinion or the conclusion of the vice president from these facts as to the extent of their powers or duties. *Held*, that the rulings of the judge, thus interpreted, were correct, and that the jury were not misled.

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The ruling of a presiding judge excluding a portion of an answer to an interrogatory affords no ground for exception, if there was nothing material in the portion excluded that was not stated fully in the part of the answer which was admitted in evidence.

CONTRACT against the Mexican Central Railway Company, Limited,* a corporation organized under R. L. c. 111, §§ 281–285, to recover damages for the breach of an alleged agreement to pay the reasonable expenses incurred by the plaintiffs for the production of a book to be called "The Sportsmen's Guide Book of Mexico." Writ dated February 14, 1907.

In the Superior Court the case first came on to be tried before *Pierce*, J., who, after a part of the plaintiffs' evidence had been introduced, discharged the jury and ordered that the action be continued. The plaintiffs soon after filed interrogatories to the defendant, the answers to which, made by the defendant's vice president, are referred to and in part are quoted and described in the opinion.

Later the case was tried before *King*, J., the parties being represented by the same counsel as at the first trial. The jury returned a verdict for the plaintiffs in the sum of $1,718.27; and the defendant alleged exceptions, raising the questions which are stated in the opinion.

The case was argued at the bar in March, 1910, before *Knowlton*, C. J., *Morton*, *Loring*, *Braley*, & *Rugg*, JJ., and afterwards was submitted on briefs to all the justices.

H. S. Davis, for the defendant.

A. H. Russell, (*T. H. Russell, 2d*, with him,) for the plaintiffs.

KNOWLTON, C. J. In this case there was evidence from the two plaintiffs that an oral agreement for the payment of money was made with them by one McDonald, the defendant's general passenger agent in the city of Mexico, which, if it was binding upon the defendant as a contract, justified and required a finding for the plaintiffs. McDonald was not called as a witness, nor was Murdock, the defendant's passenger traffic manager, who was said by the plaintiffs to have been present when this agree-

* The defendant in this case was the same corporation that was the plaintiff in the case of *Mexican Central Railway Company* v. *Commonwealth*, 192 Mass. 129, although the word "Limited" is omitted from its name in the title of that case.

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ment was made in Mexico, and to have participated in making it and to have acted under it.

The defense was a general denial that this agreement was made, and a denial that either McDonald or Murdock had authority to make it, and a contention that such an agreement could not be proved by oral testimony because the previous negotiations between the parties touching the subject had been reduced to the form of a contract in writing, and that, if there was any binding contract, it was this writing which could not be contradicted, varied or enlarged by evidence of an oral agreement. The writing was in the form of a letter from one Carson, the defendant's eastern agent in the city of New York, to the plaintiffs. The plaintiffs wrote a letter in reply accepting the terms stated by Carson.

The subsequent oral agreement made in Mexico, relied on by the plaintiffs, was to make a payment in money of a reasonable sum, probably from $2,000 to $3,000, toward the expenses of the plaintiffs in publishing a sportsman's guide to the Mexican Central Railway, which was the subject to which the previous writing related.

We assume, in accordance with the defendant's contentions, that the writing did not call for the payment of any money by the defendant to the plaintiffs, that it purported to cover the whole subject of the publication of this guide book, that it was in such a form as merged all previous negotiations between the parties, and that the testimony as to what occurred in these negotiations was not competent to show that the writing was incomplete and that the parties contemplated making some further arrangements in regard to the expenses involved in the project. Some of these matters are not plain, and the justices are not unanimous in their view of them.

The exceptions are to the refusal to give numerous instructions requested, to instructions given so far as they were inconsistent with those requested, and to rulings upon evidence. There was a series of requests as to the authority of McDonald and Murdock to make the oral agreement relied on. According to the testimony, McDonald made the agreement, although Murdock was present some of the time, and took part in the conversation. As the case was submitted to the jury it becomes necessary to

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consider whether there was evidence that either or both of these persons had authority to make such a contract.

There was evidence from the answers of the defendant's vice president to interrogatories that McDonald was the defendant's general passenger agent, with offices in the City of Mexico, and was held out to the public as such by the use of his name on letterheads and otherwise; that his duties "were to exercise direct charge over the work of soliciting and securing passenger traffic for the road, and to make arrangements for that purpose." It also appeared that the proposed guide book was intended to "make known and popularize the hunting and fishing regions" along the line of the railroad, and that the defendant, before making this arrangement with the plaintiffs, had planned to publish a similar guide book entirely at its own expense. It appeared from the answers of the vice president that the defendant, at and about the time of making this arrangement, advertised in various newspapers and magazines, and that contracts for such advertising were made either by Murdock or McDonald. Murdock's duties as passenger traffic manager "were generally to supervise the work of the passenger department." The evidence tended to show that these two men represented the defendant generally at the head of this important department of a great railway corporation, and that their duties could not be properly performed without the frequent expenditure of substantial sums of money. Included in their charge was the advertising department, and the vice president answered that they contracted for the advertising, and had authority to give in return for it a certain amount of free or reduced rate transportation over the defendant's lines. But he said that neither of them had authority to make any contract for any purpose that involved the expenditure of money, without first having obtained special authority from an executive officer of the company. The jury might or might not believe this. If it was true, it was in the nature of a secret limitation of the general authority that these men were held out as possessing. Apparently, they were the general and highest representatives of the corporation that had any direct dealings with the public in reference to the business of the passenger department. They seem to have had all the authority that anybody dealing with the public had to

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bind the corporation by contracts for the expenditure of money in their department. The business which they had in charge called for the expenditure of money. A secret instruction to them, as general agents in charge of such business, that they should obtain permission from an executive officer before expending any money, was not binding upon persons dealing with them in good faith, in reliance upon their ostensible authority. *Fay* v. *Noble*, 12 Cush. 1. *Merchants' National Bank* v. *Citizens' Gas Light Co.* 159 Mass. 505. *McNeil* v. *Boston Chamber of Commerce*, 154 Mass. 277, 286. *Cincinnati, Indianapolis, St. Louis & Chicago Railway* v. *Davis*, 126 Ind. 99. Upon the evidence in this case, the requests for rulings in regard to the authority of McDonald and Murdock were rightly refused.

The thirteenth request,* relative to the effect of proceedings at the former trial, was rightly refused. The presiding judge was not bound by any intimations or expressions of opinion of the judge at that trial.

The other requests were for the direction of a verdict for the defendant, and for a ruling "that there was no evidence that the defendant committed any breach of any contract with the plaintiffs, and the verdict must therefore be for the defendant." Upon the refusal of such requests, if the judge does not ask the requesting counsel to point out more particularly the propositions of law upon which he relies, it is possible to raise in this court any question of law actually involved in the request and refusal, even though it was never referred to or thought of by the judge or counsel at the trial.

The defendant now contends that the oral agreement was made in Mexico, a country which has not inherited the common law of England, that no evidence was introduced of what the law is in

* The ruling requested by the defendant here referred to was as follows: "13. The evidence introduced at this trial for the purpose of showing authority on the part of J. C. McDonald or W. D. Murdock or either of them to make such a contract as is alleged by the plaintiffs to have been made is no stronger than or materially different from the evidence introduced or offered to be introduced at the former trial of this case and since the evidence so introduced or offered to be introduced was then held by the court to be insufficient to warrant a verdict for the plaintiffs the verdict must therefore be for the defendant."

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Mexico, that there is no presumption in regard to the law of a foreign country unless it is one which is known to be governed by the common law, and that therefore the plaintiffs cannot prevail because the court cannot find a rule of law applicable to the case. If this view was in the mind of counsel at the trial, it does not seem to have been stated; but we are obliged to consider it.

The question is, by what presumption, if any, will the court be governed under such circumstances. In Story on Conflict of Laws, (8th ed.) § 637, in a long and elaborate note is this language of the learned editor: "Presumption has a proper place within limits in regard to foreign laws. Thus it could not be necessary to give evidence that in a foreign country breach of contract, battery, conversion, or damage caused by fraud or negligence would give a right of action." In *Whitford* v. *Panama Railroad*, 23 N. Y. 465, 468, Judge Denio says in the opinion: "Hence, if one bring a civil action for false imprisonment, or for an assault and battery committed abroad, he need not, in the first instance, offer any proof that such acts are unlawful, and entitle the injured party to a recompense in damages, in the place where they were inflicted; for the courts will not presume the existence of a state of the law in any country by which compensation is not provided for such injuries." Chief Justice Redfield, speaking for the court in *Langdon* v. *Young*, 33 Vt. 136, used these words: "But in the absence of all proof, courts assume certain general principles of law, as existing in all Christian States, as that contracts are of binding obligation, and that personal injuries are actionable." In the note of Dean Bigelow to which we have referred, he discusses many decisions of the courts, and criticises those that hold, in the absence of any evidence of the law of a foreign country, that there is a presumption that such country has the same law as the State or country of the forum; or, to put the proposition a little differently, that in the absence of any evidence of the law of a foreign country, the court will administer the law of the forum, thus putting the burden of proof upon the party who would avoid the application of the law of the forum to his case. He treats the whole subject as depending upon presumptions of fact which the court will apply according to common knowledge and experience.

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Mr. Wigmore, in his work on Evidence, also says in § 2536 that presumption may, within certain limits, be resorted to. He adds, "If the foreign State is not one whose system is founded on the common law the presumption (that its law is the same as that of the forum) will probably not be made, unless the principle involved is one of the law merchant common to civilized countries." Here is an implication that universal rules or principles known to be common to all civilized countries, will be presumed to be recognized by the courts of all nations.

In the application of the law there has been a great diversity in the decisions. Some things seem to be generally settled. The law of a foreign State or country is to be established as a fact, either by direct proof or by a proper presumption. It is not to be presumed that the people in other States or countries have made the same statutory provisions that were made by the people of the State where the court sits. These statutes depend upon the views of the legislators, which may differ in different places. So of the common law, that has grown up through judicial decisions into an elaborate system, going very far beyond the fundamental principles that may be supposed to be recognized everywhere. All States and countries that have grown up under this system, or have inherited it, may be presumed to regard it in all its details. But other countries that live under a different system are not presumed to be governed by these provisions that exist only through precedents established by the courts. There is every reason why they should be presumed to recognize fundamental principles of right and wrong which lie at the foundation of human society, and to hold that a direct violation of these principles, to the injury of another person, creates a legal liability. If one should sue on a contract for goods sold and delivered in France, upon a promise to pay a certain price for them, it would seem unreasonable that a plaintiff should be obliged to bring evidence from that country that a breach of such a contract there creates a liability. So if one should sue for damages suffered from an assault and battery, or from a larceny committed there. There ought to be a presumption from common knowledge that a liability exists everywhere in such cases.

Some courts have gone further, and have held that, in the ab-

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sence of any proof of the foreign law, the court will administer the law of its own jurisdiction. This is the law in New York, and in the Supreme Court of the United States. *Hynes* v. *McDermott*, 82 N. Y. 41. *The Scotland*, 105 U. S. 24, 29, 30.

In this Commonwealth a plaintiff was permitted to recover under a contract governed by the law of Scotland, when no evidence was introduced to show what the law of that country was. *Chase* v. *Alliance Ins. Co.* 9 Allen, 311. In *Rau* v. *Von Zedlitz*, 132 Mass. 164, 170, the court said: "It is conceded that, in the absence of any evidence of the law of Saxony, the question of duress or undue influence is to be determined by the law of this Commonwealth." The case was decided upon this view of the law. Upon the question whether a protest of a draft was necessary to charge a party under the law of Turkey, it was said in *Aslanian* v. *Dostumian*, 174 Mass. 328, that the court would not presume that the rules of the law merchant, or of the common law relative to such a matter as the protest of commercial paper, prevailed in Turkey, although this is not the principal ground of the decision. In *Harvey* v. *Merrill*, 150 Mass. 1, 5, the court said: "The rights of the parties are to be determined by the law of Illinois, but there is no evidence that the common law of Illinois differs from that of Massachusetts." This is given as the reason for deciding the case under the law of Massachusetts. *Mittenthal* v. *Mascagni*, 183 Mass. 19, 23, was an action upon a contract made in Italy, in which no evidence of the law of Italy was introduced. The court said: "Assuming this, we must also assume that the law of Italy is like our own," and the plaintiff was permitted to recover. *Bayer* v. *Lovelace*, 204 Mass. 327, was an action involving the rights of a party summoned as a trustee in an action of contract, in which he set up, as a ground for his discharge, the judgment of a court in Columbia, South America. The court said: "We are not informed as to what the law of Columbia is, in reference to such conditions as appear in this case, but there is no reason to think that it is different from that of this country." The case was decided against the trustee, according to the law of this country, but the burden was upon the trustee to prove the effect of the judgment, and to establish the law of Columbia if he relied upon it for his discharge.

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In the present case the law upon which the plaintiffs rely is that creating a liability upon a simple contract to pay money for a valuable consideration. We are of opinion that, in an action upon a simple contract of this kind, there is a broad general presumption of fact that such a contract creates a liability in all civilized countries, which presumption is sufficient to entitle the plaintiff to recover, if no evidence is introduced of the law of the place where the contract is made. In so deciding we do not go so far as the cases which hold that, in the absence of evidence of the foreign law, the court will in all cases apply the law of the forum. We treat this, not as a presumption that the law of the foreign country is the same as the law of the forum, but as a presumption that all countries, in their courts of justice, will give effect to universally recognized fundamental principles of right and wrong in deciding between contending parties.

The defendant contends that there was no consideration for the promise to pay money to the plaintiffs, because they were already bound by the writing to do all that they undertook to do under the oral agreement. As a general proposition, it is settled in this Commonwealth that a promise to pay one for doing that which he was under a prior legal duty to do is not binding for want of a valid consideration. *Smith* v. *Bartholomew*, 1 Met. 276. *Commonwealth* v. *Johnson*, 3 Cush. 454. *Pool* v. *Boston*, 5 Cush. 219. *Warren* v. *Hodge*, 121 Mass. 106. It has often been said that the principle involved is the same that lies at the foundation of the doctrine that a promise to accept or pay a less sum in discharge of a debt for a greater amount is not binding. In connection with the general proposition see also *Cabot* v. *Haskins*, 3 Pick. 83, 92, 93; *Tobey* v. *Wareham Bank*, 18 Met. 440, 449; *Lester* v. *Palmer*, 4 Allen, 145; *Harlow* v. *Putnam*, 124 Mass. 553.

A limitation of the general proposition has been established in Massachusetts, in cases where a plaintiff, having entered into a contract with the defendant to do certain work, refuses to proceed with it, and the defendant, in order to secure to himself the actual performance of the work in place of a right to collect damages from the plaintiff, promises to pay him an additional sum. This limitation is not intended to affect the rule that a

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contract cannot be binding without a consideration; but it rests upon the doctrine that, under these circumstances, there is a new consideration for the promise. *Monroe* v. *Perkins*, 9 Pick. 298. *Holmes* v. *Doane*, 9 Cush. 135. *Peck* v. *Requa*, 13 Gray, 407. *Rollins* v. *Marsh*, 128 Mass. 116. *Rogers* v. *Rogers*, 139 Mass. 440. Allen, J., in *Abbott* v. *Doane*, 163 Mass. 433, 434, 435. In *Rollins* v. *Marsh*, 128 Mass. 116, 120, the court said: "The parties had made a contract in writing with which the plaintiff had become dissatisfied, and which she had informed the defendant that she should not fulfil unless the terms were modified. If she had abandoned her contract, he might have made a new arrangement with some one else for the support of his ward, and enforced whatever remedy he had for the breach against the plaintiff. Instead of this, he made a new contract with her, which operated as a rescission of the original agreement." In such a case the new promise is given to secure the performance, in place of an action for damages for not performing, as was pointed out by this court in *Peck* v. *Requa*, 13 Gray, 407, 408.

This limitation in the application of the general rule to such facts is not recognized in England, nor in most of the States in this country. See *Abbott* v. *Doane*, 163 Mass. 433, 434, 435; Leake, Con. (4th Eng. ed.) 434–436; Pollock, Con. (7th Eng. ed.) 184–186; Harriman, Con. §§ 117–120. See also 8 Harvard Law Review, 27; 12 Ibid. 515, 521, 531; 13 Ibid. 519; 17 Ibid. 71. While it is well established in Massachusetts, the doctrine should not be extended beyond the cases to which it is applicable upon the recognized reasons that have been given for it. A majority of the court are of opinion that it is not applicable to the evidence in this case, and that the defendant is right in its contention that, upon the assumption that the parties were bound by the written contract, there was no consideration for the new promise of the defendant.

But the judge could not give either of these two rulings without assuming, and virtually ruling as matter of law, that the writing was a binding contract. For the defendant, it was signed by Carson, the defendant's eastern agent. The defendant's answer was a general denial of all the plaintiff's averments. The defendant's vice president's answers to interrogatories were in evidence, in which he said that, "Outside of contracts involv-

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ing the transportation of freight or passengers, the general eastern agent had no authority whatever to enter into any contract of any kind or character in behalf of the company, without securing authority from his superior officers either in the passenger or the freight department." This evidence was uncontradicted. While there was testimony indicating that Carson communicated by letter with some superior officer in Mexico before completing the negotiations with the plaintiffs, there was nothing more than the possibility of an inference in regard to what authority he obtained. While the principal dispute between the parties was in regard to the oral agreement made in Mexico, the authority of Carson to bind the defendant by the writing was a fact to be proved in the case before either party could avail himself of the writing as a contract, and the judge, in his charge, submitted to the jury the question of Carson's authority, as he did also questions as to the authority of McDonald and Murdock. A majority of the court are of opinion that in dealing with the requests of the defendant, the judge could not assume or rule as matter of law that Carson had authority to bind the defendant by the writing, and he therefore could not rule that there was a valid contract in writing by which the parties were bound when the agreement was made in Mexico, and that the oral agreement was without consideration because the plaintiffs were to do no more under it than they had previously contracted to do. If the jury failed to find that the writing was authorized by the defendant, they might find that an oral agreement was made in Mexico, which adopted and included the provisions that previously had been reduced to writing, and that then for the first time became binding, because made a part of the general agreement between the plaintiffs and the defendant's representatives. Under such a possible finding, this question which the defendant now argues could not arise, and the defendant would be liable.

The defendant contends that the plaintiffs cannot recover because they did not completely perform their contract. The declaration is for damages for a breach of the contract. There was evidence that the defendant agreed to provide for the expenses incurred by the plaintiffs in the prosecution of the work; that McDonald told the plaintiffs to send the bills for

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their personal expenses to him; that they incurred large expenses, and that the defendant, though requested, refused to pay the plaintiffs any money and denied its liability to pay anything or to make any provision for the payment of the expenses. This justified the plaintiffs in refusing to go on with their contract, and in suing the defendant for damages for its breach of the contract.

The question to Carson, "Did you, yourself, have authority to spend any money for advertising purposes?" put by the defendant, "expecting the witness to answer that he had no such authority," was rightly excluded. It called for a conclusion of the witness as to the legal effect of his relations with the defendant, and not merely for facts which would show whether he had authority. So far as appears, he was permitted to testify fully as to the facts.

We are also of opinion that the language of the judge in regard to the interrogatories and the rulings upon them, when rightly interpreted, was not erroneous. The first part of his statement was, in substance, that the answers were evidence of the facts tending to show the authority or want of authority of the agents; but not evidence so far as they stated the opinion or the conclusion of the vice president from these facts as to the extent of their powers or duties. While the meaning of the judge was not very clearly expressed, we are of opinion that the jury were not misled in regard to it.

The defendant did not suffer from the exclusion of the last two sentences of the answer to the fourteenth interrogatory. There was nothing material in these sentences that was not fully stated in the earlier part of the answer.

Exceptions overruled.

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ALEXANDER J. WILCOX & others *vs.* ATTORNEY GENERAL & others.

Bristol. October 24, 1910. — January 3, 1911.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Will. Trust, Indefiniteness, Resulting. *Charity. Devise and Legacy.*

A testamentary disposition of property cannot be made partly by parol and partly under the statute of wills, and therefore a provision in a will for charitable purposes, which cannot be defined or designated except from oral communications made by the testator in his lifetime and referred to in his will, is bad for indefiniteness.

A clause of a will gave the residue of the estate of the testator, which consisted of both realty and personalty, to the person named as executor "in trust, nevertheless, to carry out certain other purposes of mine mentioned to him and to A. . . . and relating to certain benevolent and charitable institutions and associations; to a clock tower and clock in memory of my sister B.; to the use of our old homestead estate as a memorial to my mother to be known as the 'Eliphal Tucker Borden Park Play Grounds' et cetera." *Held*, that, since resort could not be had to the oral communications of the testator in order to ascertain the objects of the charity, the trust was so indefinite that it could not be executed, and that therefore a resulting trust for the benefit of the heirs at law and next of kin of the testator arose.

BILL IN EQUITY, filed in the Probate Court for the county of Bristol on October 7, 1909, for the construction of the will of Ariadne J. Borden, late of Fall River.

By the first clause of the will $1,000 was bequeathed to the testatrix's friend, Abbie C. Anthony. By the second clause $500 was given to each of six other friends. The third clause bequeathed a sum not exceeding $5,000 to the executor, "the same to be expended in work on my cemetery lot . . . on monuments, curbing, grading et cetera, as suggested to him in our personal conversations about this matter and the plan given to Abbie C. Anthony aforesaid." The fourth clause is quoted in the opinion. A clause numbered "4 A" gave $1,000 each to two cousins.

A decree was made in the Probate Court declaring that the clause quoted in the opinion constituted a valid trust. On appeal to the Supreme Judicial Court, the case was heard by *Braley*, J., who, having found certain facts, which have become

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immaterial, reserved the case for determination by the full court.

A. S. Phillips, (*B. Ferring* with him,) for the plaintiffs.

H. A. Dubuque, for the Attorney General.

A. J. Jennings, for the executor and trustee Earl.

BRALEY, J. The testatrix in the fourth clause of her will devised and bequeathed the residue of her estate "to Henry H. Earl . . . in trust, nevertheless, to carry out certain other purposes of mine mentioned to him and to Abbie C. Anthony . . . and relating to certain benevolent and charitable institutions and associations; to a clock tower and clock in memory of my sister Mary Amanda Borden; to the use of our old homestead estate as a memorial to my mother Eliphal Tucker Borden to be known as the 'Eliphal Tucker Borden Park Play Grounds' et cetera. And I hereby give to my said trustee full power and authority to sell other lots of land and improvements thereon and to give full deeds of conveyance and acquittance thereof in fee simple and to use the proceeds in carrying out said designated plans and purposes; also to buy any other lots or parcels of land necessary to more fully carry out said plans and purposes. I also give my said trustee full power to buy, exchange, invest and reinvest my personal estate as he may consider best for the interests of my estate and the foregoing plans and purposes referred to." It being plain that no personal bequest was intended, as the trustee was to hold and distribute the property in accordance with the wishes of the testatrix, the trust cannot be administered unless a definite charitable gift is disclosed. If the trust had been for such charitable purposes as the trustee in his discretion might select, or if the directions had been specific that he was to erect, for the benefit of the public, a clock tower with a clock in memory of her sister, and to convert the homestead into a park or playground as a memorial to her mother, the phrase relating to her previous verbal instructions might be treated as merely descriptive as in *Wells* v. *Doane*, 3 Gray, 201, 204, and a valid charity established. *Minot* v. *Baker*, 147 Mass. 348. *Gill* v. *Attorney General*, 197 Mass. 232. *Molly Varnum Chapter, D. A. R.* v. *Lowell*, 204 Mass. 487, 493, and cases cited. *New England Sanitarium* v. *Stoneham*, 205 Mass. 335, 341. But while a general purpose to devote the residue to charity is evi-

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dent, the objects finally to be selected are not designated, and can be ascertained only upon resort to the verbal communications made to the trustee and to Abbie C. Anthony. If these instructions had been in writing, a reference to the instrument would have incorporated it with the will, but as a testamentary disposition of property cannot be made partly under the statute of wills and partly by parol, the trust is so indefinite that it cannot be executed. *Minot* v. *Attorney General*, 189 Mass. 176, 179, 180. *Berry* v. *Dunham*, 202 Mass. 133, 139.

It follows, that after the payment of the pecuniary legacies and of the bequest to the executor for the purposes named in clause three over which there is no dispute, the residue goes to the heirs at law of the testatrix who take by way of a resulting trust. *Nichols* v. *Allen*, 130 Mass. 211. *Minot* v. *Attorney General*, 189 Mass. 176. *Bowden* v. *Brown*, 200 Mass. 269.

Decree accordingly.

WILLIAM CARNEY *vs.* A. B. CLARK COMPANY.

Essex. November 1, 1910. — January 3, 1911.

Present: KNOWLTON, C. J., HAMMOND, LORING, SHELDON, & RUGG, JJ.

Negligence, Employer's liability. *Statute*, Construction.

In an action by a roofer against his employer for injuries sustained in falling from the roof of a building while engaged with two others in laying "paroid" paper thereon, it appeared that the building was two hundred feet long and had a pitched roof, that its eaves were fifty feet above the ground, that the work was begun at the ridge pole and the paper was laid parallel to the ridge pole in strips three feet wide, that while the men were standing upon a bracket staging a few feet below the eaves, engaged in laying the lowest strip, a gust of wind tore the paper from the hands of the other two men stationed at each end, wrapped the paper around the plaintiff, who was stationed between the two, and hurled him to the ground. There was evidence that one of the other two men, who was acting as a temporary substitute for the superintendent, had ordered that this last strip should not be tacked temporarily to the roof as it was unrolled. *Held*, that, in view of the facts above stated and of other evidence in the case as to the velocity of the wind, the size, weight and texture of the paper and the length of the strip unrolled, the questions, whether the order was given, whether, if given, it was a negligent order and whether the injury to the plaintiff was caused thereby, were for the jury.

In an action by a workman against his employer under R. L. c. 106, § 71, cl. 2, which requires the plaintiff, in order to recover, to show negligence of a super-

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intendent, whose sole or principal duty is that of superintendence, or negligence of a person acting temporarily as his substitute in his absence by authority or consent of the employer, the substitute need not be shown to be a person whose sole or principal duty is that of superintendence.

TORT by a boy, nineteen years of age when injured, against his employer for personal injuries sustained on the morning of October 25, 1907, by being thrown to the ground from the roof of one of the defendant's factories in Peabody in the manner described in the opinion. Writ dated December 3, 1907.

The sixth count of the declaration, on which alone the plaintiff relied, alleged that the plaintiff was injured by reason of the negligence of some person in the service of the defendant entrusted with and exercising superintendence, whose sole or principal duty was that of superintendence, or, in the absence of such superintendent, of a person acting as superintendent with the authority and consent of the defendant.

In the Superior Court the case was tried before *Stevens*, J., who at the close of the evidence ordered a verdict for the defendant. The plaintiff alleged exceptions.

W. B. Sullivan, (*W. H. Fay & J. J. Gaffney*, with him,) for the plaintiff.

J. G. Walsh, for the defendant.

HAMMOND, J. The plaintiff, with Cleveland and Machury, all being employees of the defendant, were laying "paroid" paper on the roof of one of the defendant's buildings. The building, which was two hundred feet long, had a pitched roof, and its eaves were fifty feet above the ground. The work was begun at the ridge pole, parallel with which the paper was laid in strips three feet wide. While the men were standing upon a bracket staging a few feet below the eaves, engaged in laying the lower strip, a gust of wind tore the paper from the hands of the other two men stationed one at each end, wrapped the paper around the plaintiff, who was stationed between the two, and hurled him to the ground.

The due care of the plaintiff is admitted. There was evidence that Cleveland ordered that this last strip of paper should not be temporarily tacked to the roof as it was unrolled, and that he had authority to give such an order. In view of the evidence as to the giving of the order, as to the velocity of the wind, the

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size, weight and texture of the paper, the length of the strip unrolled, the distance of the staging from the ground and the consequent seriousness of the injury likely to result to a person through a fall therefrom, the questions whether the order was given, whether, if given, it was a negligent order, and whether the injury to the plaintiff was caused thereby, were for the jury.

The only remaining question is whether the relations of the defendant to Cleveland and to the plaintiff were such as to make the defendant answerable for this negligence, or in other words whether the order of Cleveland was in law the order of the defendant.

The plaintiff relies upon R. L. c. 106, § 71, cl. 2, which holds an employer responsible to a careful employee for (1) "the negligence of a person in the service of the employer who was entrusted with and was exercising superintendence, or (2) in the absence of such superintendent, of a person acting as superintendent with the authority or consent of such employer." It is plain that the plaintiff cannot stand upon the first part of the clause. There was no evidence which would justify a finding that Cleveland was a person whose sole or principal duty was that of superintendence. It certainly was not his sole duty, and even upon the plaintiff's own testimony it was not his principal duty. In this respect the case must be regarded as one of the class of which *O'Neil* v. *O'Leary*, 164 Mass. 387, is a type.

Can the plaintiff stand upon the second part of that clause? This leads to an inquiry as to the meaning of that part. By a series of decisions beginning with *Farwell* v. *Boston & Worcester Railroad*, 4 Met. 49, it has been constantly held by this court that by the common law of this State an employer who uses due diligence in the selection of competent and trustworthy employees and in the furnishing of proper tools and appliances is not answerable to one employee for the carelessness of another when both are engaged in the same service, or, more tersely stated, that the master is not responsible to one servant for the carelessness of a fellow servant. And this is so even although the negligent employee is a superintendent, or foreman acting within his sphere as such. *Albro* v. *Agawam Canal Co.* 6 Cush. 75. *O'Connor* v. *Roberts*, 120 Mass. 227. St. 1887, c. 270, however

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changed in many important respects the common law upon this subject. The first section of that statute provided that an employer should be answerable to a careful employee for injury caused to him (1) "by reason of any defect in the condition of the ways, works or machinery . . . used in the business . . . , which arose from or had not been discovered or remedied owing to the negligence of the employer or of any person in the service of the employer and entrusted by him with the duty of seeing that the ways, works or machinery were in proper condition," or (2) "by reason of the negligence of any person in the service of the employer, entrusted with and exercising superintendence, whose sole or principal duty is that of superintendence"; and (3) "by reason of the negligence of any person in the service of the employer who has the charge or control of any signal, switch, locomotive engine or train upon a railroad." It will be noted that in the two particulars named in the first and third clauses respectively the person for whose negligence the employer is answerable need not be a person whose chief duty is that of superintendence, or even (in the first clause) that of caring for the proper condition of the ways, etc., or (in the third clause) that of having charge and control of the switch, etc. It is sufficient if a part, and even a small part, of his duty is the care of the ways, or of the switch, etc. But, when the subject of the liability of the employer for negligence of his employees in other respects than those thus particularly specified is reached, the provision is that the negligent employee must be a person whose sole or principal duty is that of superintendence. Briefly stated, the employer was to be held liable in any event for the act of his employee in the two respects particularly specified, whether or not the negligent employee was chiefly employed in other duties, but his liability for negligence of an employee in other respects, that is, his general liability for such negligence, was confined to the cases where superintendence was the sole or principal duty of the negligent employee. It is manifest that, while the first and third clauses might be held applicable to every employer, whether or not he had a superintendent whose sole or principal duty was that of superintendence, the second clause had no such broad application. With respect to the liability created by this clause employers were really divided into two

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classes, of which the first was composed of such as had superintendents of the kind named in the clause, and the second of those who did not. As to the first class the common law was modified, while as to the second it stood as before. Such is the plain reading of the clause and such always has been the judicial construction of it. *Malcolm* v. *Fuller*, 152 Mass. 160. *O'Neil* v. *O'Leary*, 164 Mass. 387, and cases cited. *Gardner* v. *New England Telephone & Telegraph Co.* 170 Mass. 156.

Thus stood the law for seven years, at the expiration of which time this second clause was amended by adding thereto these words: "Or, in the absence of such superintendent, of any person acting as superintendent with the authority or consent of such employer." St. 1894, c. 499. And the second clause as thus amended has ever since stood. R. L. c. 106, § 71, cl. 2. St. 1909, c. 514, § 127, cl. 2.

What is the effect of this amendment? It may be suggested that its effect is to hold every employer liable, provided that with his authority or consent the negligent employee be acting as superintendent, entirely irrespective of the question whether or not superintendence be his sole or principal duty. If this be the meaning of the amendment, there was no necessity for retaining the first part of the clause; and the plain and obvious course would have been to strike out the second clause as it originally stood and substitute in its place the words constituting the amendment. It may also be suggested that its effect was to hold the employer liable for the negligence of a person acting as a temporary substitute for a superintendent whose sole or principal duty was that of superintendence, but only in cases where the substitute himself is a person whose sole or principal duty is that of superintendence. If this be its meaning, then the amendment was useless because it made no change. Neither one of these interpretations therefore seems satisfactory. The statute as amended should, if it be reasonably practicable so to do, be so construed as to give effect to every part of it, as well that part which was allowed to stand as that part which was added.

There is no difficulty in placing such an interpretation upon it. As the clause was originally drawn, the negligent employee must have been a person whose sole or principal duty was that

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of superintendence; and unless an employer had such a superintendent he was not affected by the statute. But it is obvious that at times this superintendent might be temporarily absent and some person for a time might act as his substitute by the authority or consent of the employer, and yet not be a person whose sole or principal duty was superintendence. We are of opinion that this amendment applies only to such a case. Since the amendment, as before, the only employers affected by the clause are those who have a superintendent whose sole or principal duty is that of superintendence. The only effect of the amendment is to extend their liability so as to cover the case of the negligence of a temporary substitute of such a superintendent. The employer who has such a superintendent is answerable for the negligence of any substitute acting by the authority or consent of the employer; and that is so, entirely irrespective of the qualifications or general duties of the substitute. Such an interpretation gives due effect to the clause as originally written and still retained, and proper scope for the action of the amendment. It perfects the liability of the employers originally affected by the clause, and in the general direction originally indicated. It is suggested by the natural meaning of the words "in the absence of such superintendent." The word "absent," as applied to persons, primarily implies the existence of the person who for the time being is not present. And with the possible exception of a case to be hereinafter mentioned such seems to have been the interpretation placed upon the effect of the amendment, both by the bar and the courts. Cases have been brought upon the first part of the second clause, and the question whether it was material to show that the superintendent was one whose sole or principal duty was that of superintendence has been discussed by this court as though material. See *Baldwin* v. *American Writing Paper Co.* 196 Mass. 402; *Fitzgerald* v. *Worcester & Southbridge Street Railway*, 200 Mass. 105; *Robertson* v. *Hersey*, 198 Mass. 528. In this last case it was said by Rugg, J., that the chief question was "whether there was sufficient evidence that McArthur, by the direction of whom the compound pry was used, was a superintendent 'whose . . . principal duty was that of superintendence,' within the meaning of these words as used in . . . R. L. c. 106, § 71." Perhaps the

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case which contains the best illustration of the true interpretation of the clause as amended is *Knight* v. *Overman Wheel Co.* 174 Mass. 455. That was an action brought under St. 1887, c. 270, § 1, cl. 2, as amended by St. 1894, c. 499, for injuries suffered by the plaintiff's intestate, who at the time of the injury was an employee of the defendant. It went to the jury only on the third and fourth counts. The negligence set out in the third count was that of "some person in the service of the defendant entrusted with and exercising superintendence, whose sole or principal duty was that of superintendence"; and the negligence set out in the fourth count was that of "some person in the service of the defendant, who at the time was acting as superintendent, with the authority and consent of the defendant, in the absence of the defendant's superintendent." The negligence proven was that of one Freeman. The defendant asked for a ruling that the plaintiff could not recover on either count, — on the third because there was no evidence that Freeman was a superintendent whose sole and principal duty was that of superintendence, and on the fourth because there was no evidence that Freeman was acting as superintendent with the authority and consent of the defendant and in the absence of the defendant's superintendent. The requests were refused and in this court the refusal was upheld. Lathrop, J., in giving the opinion of the court said (p. 460): "As to whether Freeman was a superintendent, there was no doubt that he was a foreman in charge of a gang, of which the plaintiff's intestate was a member; but this fact alone does not determine the question whether his principal duty was that of superintendence. On this point the evidence was conflicting"; and he finally says in substance that this question is for the jury. As to the fourth count he says (p. 461): "There was evidence in the case that Freeman was intrusted with the duty of superintending the work of lowering the shafting [by the sudden fall of which the plaintiff's intestate was injured] by the general superintendent of the defendant company, and that the superintendent took no charge of the work, and was not present. This brought Freeman within the purview of the St. of 1894, c. 499."

In this opinion the true construction, although not explicitly stated in full, is still clearly indicated. In an action under this

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clause it is necessary to show negligence of a superintendent whose sole or principal duty is that of superintendence, or of a person acting temporarily as his substitute in his absence by authority or consent of the employer, but the substitute need not be shown to be a person whose sole or principal duty is that of superintendence. When by the consent of the employer the substitute puts on the uniform of the original superintendent, the condition is the same as though the original and not the substitute were the wearer of the uniform. So far as *McCabe* v. *Shields*, 175 Mass. 438, contains anything inconsistent with this view it cannot stand.

In the case before us the defendant cannot be held upon the ground that Cleveland's principal duty was that of superintendence. *O'Neil* v. *O'Leary*, 164 Mass. 387, and cases cited. But we think there was evidence that the work of papering the roof was under the general superintendence of Clark, and that his sole or principal duty was that of superintendence and that by the authority and consent of the defendant acting through Clark, its chief executive officer, Cleveland was acting as the foreman or superintendent of this work in the absence of the general superintendent. Under these findings the case comes within the last half of the clause in question, *Knight* v. *Overman Wheel Co.* 174 Mass. 455, and should have been submitted to the jury.

Exceptions sustained.

WILLIAM A. FAY *vs.* FRANK H. HASKELL, administrator.
FRED L. PERKINS *vs.* SAME.

Essex. November 1, 2, 1910. — January 3, 1911.

Present: KNOWLTON, C. J., HAMMOND, LORING, SHELDON, & RUGG, JJ.

Executor and Administrator. Insolvent Estates of Deceased Persons. Words, "Further assets," "New assets."

R. L. c. 142, § 10, in the chapter relating to insolvent estates of deceased persons, provides that a creditor, who does not present his claim for allowance to the commissioners appointed by the Probate Court or, if no commissioners are appointed, to the court itself within the time prescribed by that court not exceeding eighteen

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months from the original appointment or order, shall be barred from recovering such claim, but that "if further assets of the deceased come to the hands of the executor or administrator after the decree of distribution, the claim may be proved, allowed and paid," as provided in that chapter for contingent claims. *Held*, that the "further assets" which a belated creditor may reach under the provision above quoted are the same as the "new assets" which such a creditor may reach under R. L. c. 141, § 11, upon a claim against the estate of a person who died solvent.

The term "further assets" in R. L. c. 142, § 10, like the term "new assets" in R. L. c. 141, § 11, does not include property with which the executor or administrator has been charged in his inventory or otherwise or the property into which such property or any part thereof has been changed, nor does it include the natural increment of such property in the way of interest or otherwise.

Under R. L. c. 142, § 10, where a creditor of the insolvent estate of a deceased person is seeking to show "further assets" in the hands of the administrator of his estate after the decree of distribution, he is not entitled to treat as such assets the balance from a former account of the administrator nor the proceeds in the hands of the administrator of a judgment recovered against a savings bank for a surplus remaining from the foreclosure of a mortgage made by the intestate, nor a sum received by the administrator for tools which had belonged to the intestate and had been included in the inventory, nor money received by the administrator as interest on a deposit in a national bank, nor damages recovered for the breach of a contract to purchase from the intestate a certain note and mortgage, although the note and mortgage had been inventoried as worthless, each of the assets enumerated being the product of a change in an original asset and not "further assets."

In an appeal to the Superior Court from a decree of the Probate Court a creditor of the insolvent estate of a deceased person sought to show "further assets" in the hands of the administrator of his estate after the decree of distribution. A supplementary account of the administrator filed after the decree of distribution showed his receipt of certain sums from the sales of interests in two parcels of land. In neither the first account of the administrator nor in his "second and final account," filed and allowed nearly four years later, were these interests in land or the proceeds from their sale included. The administrator testified that he knew that these parcels of land belonged to the estate of his intestate some two or three months after filing the inventory and that for a long time before the decree of distribution he had been trying to negotiate a sale of them to prospective purchasers. The administrator asked the judge of the Superior Court to rule (1) that the finding should be for the administrator, (2) that after the decree of distribution no "further assets" ever came to the hands of the administrator to which the creditor became entitled, and (3) that all the property that came to the hands of the administrator after the decree of distribution was represented in the inventory filed before the decree of distribution or was known by the administrator before that decree to be property of the intestate and therefore was not "further assets" to which the creditor was entitled. The judge refused to make any of these rulings, and found for the creditor. On exceptions alleged by the administrator, it was *held*, that, although, if the statement of the administrator in his testimony was correct, neither the interests in land nor the proceeds from their sales were "further assets," yet the judge might not have believed this testimony of the administrator, and might have concluded from all the evidence that knowledge of the interests in these two parcels of land did not come to the administrator until

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long after the expiration of the two years' limitation from the time of his appointment, and that under such a finding the sums thus received from the sales were "further assets"; that, therefore, neither the first nor the second ruling asked by the administrator should have been given, nor the third, because it assumed that the testimony of the administrator was true.

TWO APPEALS to the Superior Court from the disallowance by the Probate Court for the county of Essex of claims presented to that court under R. L. c. 142, § 10, for allowance against the estate of Charles C. Blanchard, late of Lynn, deceased insolvent.

The appellants did not present their claims for allowance within the time allowed by the Probate Court for presenting claims under the statute, but contended that they were entitled to share in certain sums in the hands of the administrator upon the ground that those sums were "further assets" which had come to the hands of the administrator after the decree of distribution within the meaning of § 10.

In the Superior Court the appeals were heard together by *Bell*, J.

The following was all the material evidence in both cases:

By a decree of the Probate Court for Essex County made on July 17, 1905, Frank H. Haskell was appointed administrator of the estate of Charles C. Blanchard, and on that date gave a proper bond for the discharge of his trust and also gave a proper notice of his appointment. The administrator, personally, was a creditor of the deceased for a large amount. On July 12, 1906, the administrator represented the estate insolvent and the Probate Court gave creditors six months from July 12, 1906, to prove their claims before that court. Due notice was given to all creditors, and the time afterwards was extended to April 4, 1907. The appellant Perkins testified that at the time when it was alleged that the notices were sent out and for a long time thereafter he was dangerously ill and did not receive or know of the notice. The administrator's first account was allowed on April 25, 1907, and on May 29, 1907, the court ordered the distribution of dividends to the creditors who had proved their claims, and these dividends were paid. The estate was insolvent, there not being sufficient assets to pay in full the creditors who had proved their claims. The second and final account of the ad-

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ministrator was filed on April 8, 1909, and was allowed on May 3, 1909, the balance of that account charged to the administrator being $436.83. That account showed as charged to the administrator the balance of the first account, amounting to $254.43, also $648.51, the proceeds of a judgment recovered against the Lynn Institution for Savings for a surplus in its hands upon the foreclosure of a mortgage upon real estate of Blanchard, which was foreclosed after the death of Blanchard, the surplus being paid over to the administrator on March 3, 1908, also the proceeds of a judgment recovered by the administrator against one Wilson for damages for the breach of an agreement made with the administrator to purchase a note and mortgage which belonged to Blanchard made by the Lynn and Boston Steamboat Company. The amount of this judgment was $49.40, which was paid over to the administrator on April 6, 1909. There was also $45.81 interest on money on deposit in the Manufacturers' National Bank of Lynn, which represented in part interest on sums deposited to pay dividends and interest on the above specified sums, also the sum of $3 for tools, the two last sums of money having been paid to the administrator on April 6, 1909. The inventory filed in the Probate Court listed land and buildings, 60 Farragut Road, Swampscott, which was the parcel of real estate upon which the Lynn Institution for Savings held the mortgage in question, and from the sale of which on foreclosure the sum of $648.51 surplus accrued. The inventory also contained the following items of personal property: "Lumber, machinery, office furniture, tools, engine, boiler," appraised at a lump sum of $3,911.40. It also contained the following item: "Bills receivable, value unknown." It also contained the following item: "Mortgage on Lynn and Boston Steamboat Company, $1,746.26" (being the mortgage before referred to). Schedule B of the administrator's first account contained as one of the items for which the administrator asked to be allowed the following: "Mortgage on Lynn and Boston Steamboat Company not collected, $1,746.26," being the mortgage before referred to. A supplementary account filed on June 21, 1909, showed in addition to the foregoing sums the sum of $15, received in May, 1909, from the sale of some interest in land on Bloomfield Street in Lynn, and a further sum of $75,

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received on June 10, 1909, from the sale of some interest in land on Reed Street in Lynn. Neither of these parcels of land or any interest therein was shown in the inventory or in either account filed before the supplementary account, but the administrator testified that he knew that these parcels belonged to his intestate as early as the autumn of 1905, some two or three months after filing the inventory, and that for a long time before the decree of distribution he had been endeavoring to negotiate a sale of them to prospective purchasers. The inventory was filed on September 7, 1905, and the administrator charged himself with the personal property in the inventory in his first account. Blanchard at the time of his decease was indebted to the appellant Perkins in the sum of $1,211.51, and was indebted to the appellant Fay in the sum of $84.70. Perkins's claim was first filed in the Probate Court on May 1, 1909, and Fay's claim was first filed in that court on May 20, 1909. On August 5, 1909, both of these claims were presented to the Probate Court for allowance, the appellants alleging that they were entitled to share in the above named sums, or some of them, by reason of the sums being further assets, but the court decreed that these sums were not further assets within the statute, and disallowed the claims. Perkins and Fay appealed from the disallowance of their claims.

In the Superior Court the appellee asked the judge to make the following rulings in each case:

1. That upon all the evidence the finding should be for the appellee.

2. That after the decree of distribution no "further assets" ever came to the hands of the administrator to which the appellant became entitled.

3. That all the property that came to the hands of the administrator after the decree of distribution was represented in the inventory filed before the decree of distribution was made or was known by the administrator before that decree to be property of the intestate, and therefore was not "further assets" to which the appellant was entitled.

4. That the appellant was not entitled to prove his claim after April 4, 1907, unless "further assets" came to the hands of the administrator.

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The judge refused to give the first three of the rulings thus requested but gave the fourth, and found for the appellant in each of the cases. The appellee alleged exceptions.

J. C. Batchelder, for the appellee.

S. H. Hollis, for the appellant Fay.

A. B. Tolman, for the appellant Perkins, submitted a brief.

HAMMOND, J. These are two appeals to the Superior Court from the disallowance by the Probate Court of claims presented against the insolvent estate of one Blanchard, deceased, under R. L. c. 142, § 10. Neither appellant presented his claim within the time prescribed by the Probate Court, but each contended that he was entitled to share in certain funds in the hands of the administrator, upon the ground that these funds were "further assets" which had come to the administrator's hands after the decree of distribution within the meaning of that section. At the trial in the Superior Court, without a jury, in each case the judge, at the request of the appellee, ruled that "the appellant was not entitled to prove his claim . . . unless 'further assets' came to the hands of the administrator"; and having so ruled, found for the appellant. Under the ruling the general finding necessarily implies that the judge found there were such further assets; and the only question is whether upon the evidence such a finding was warranted.

The section of the statute referred to relates to the proof of claims against the estate of a deceased person which has been duly represented to be insolvent, and reads as follows: "A creditor who does not present his claim for allowance in the manner herein provided [that is to the commissioners appointed by the Probate Court, or to the court, if no commissioners are appointed, within the time prescribed by that court] shall be barred from recovering the same; but if further assets of the deceased come to the hands of the executor or administrator after the decree of distribution, the claim may be proved, allowed and paid as provided in this chapter for contingent claims."

What is meant by the term "further assets" as used in this section? For more than two centuries and a quarter there has been in this jurisdiction a similar provision as to the right of a creditor of the insolvent estate of a deceased person to present his claim after the time prescribed by the court. Such a

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creditor was debarred under the colonial laws unless he could "find some other estate of the deceased not found out before, and put into the inventory"; Mass. Col. Laws, (Whitmore's ed.) 250; under the provincial laws, unless he could find "some further estate of the deceased not before discovered and put into the inventory"; Prov. St. 1692–93, c. 16; 1696, c. 8; 1 Prov. Laws, 48, 251; and under the laws of the Commonwealth, unless he should "find some other estate of the deceased, not inventoried or accounted for by the executor or administrator before distribution." St. 1784, c. 2. In Rev. Sts. c. 68, § 20, the phrase is "unless further assets of the deceased shall come to the hands of the executor or administrator, after the decree of distribution"; and such has been the form ever since. Gen. Sts. c. 99, § 21. Pub. Sts. c. 137, § 10. R. L. c. 142, § 10.

It is argued by the appellee that the term "further assets" as used in the section under consideration means in substance the same as "new assets" in R. L. c. 141, § 11, and that under the law interpreting the latter term none of the assets shown by the evidence were further assets. It is argued by the appellants that by the Revised Statutes a change was made in the law and that now "'further assets' mean and can only mean any money available for dividends which comes to the hands of the administrator after the decree of distribution." The contention is thus stated in their brief: "In other words, prior to the Revised Statutes 'further assets' were limited to such further assets as should be found by the creditor himself, and which had not been inventoried or accounted for, but since the Revised Statutes the Legislature by cutting off the qualifying words 'not inventoried or accounted for' showed clearly that thenceforth 'further assets' meant simply any additional assets from which the administrator could pay a dividend." Accordingly, as they claim, cash coming to the hands of the administrator after the decree of distribution, even although it be the proceeds of land or other property named in the inventory but sold after the decree, may be regarded as further assets.

Rev. Sts. c. 68, § 20, was enacted in the precise form drafted by the commissioners, and while they made upon that section a note of considerable length, there is nothing to indicate that by the verbal changes in the description of the kind of assets which

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would let in a belated creditor there was any intention to change in that respect the law as it had previously existed under St. 1784, c. 2.

With respect to our procedure for the enforcement of claims against the estate of a deceased person, there is a marked difference, depending upon whether the estate is solvent or insolvent. In the former case the creditor whose right of action has accrued may proceed at common law; in the latter he cannot. In the former he is barred unless the action be brought within two years from the appointment of the administrator; in the latter he is barred unless he present his claim to the Probate Court or commissioner within the time prescribed by the court, which time cannot exceed eighteen months. In each case the provision as to time is in the nature of a statute of limitations. But in either case there is a contingency under which the bar may be removed to a certain extent. Where the estate is solvent, the contingency is that new assets have been received by the administrator after the expiration of two years from the time of his giving bond (R. L. c. 141, § 11), and, where the estate is insolvent, it is that further assets have come into the administrator's hands after the decree of distribution. R. L. c. 142, § 10. In each case the bar, unless thus removed, is absolute at law. The remedy in equity provided for in R. L. c. 141, § 10, is not material to this discussion. More briefly stated, the general framework of our procedure for the enforcement of claims against the estate of a deceased person, whether the estate be solvent or insolvent, is that a creditor whose right of action has accrued shall within a certain specified time take legal steps to enforce his claim; and that if he fails so to do he shall be forever barred unless, in the case of a solvent estate, "new assets," or, in that of an insolvent estate, "further assets" have come to the hands of the administrator. Where in either case the belated creditor is barred, the surplus property does not go to the administrator as his own, but, when the estate is solvent, to the heirs at law; and when it is insolvent, to the creditors who have proved their claims within the time specified. There is no reason why there should be any distinction as to the respective rights of belated creditors in these two kinds of estate. Substantial rights ought not to depend upon the statutory course of procedure. In view of

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these considerations we are of opinion that the kind of assets which a belated creditor may reach under R. L. c. 141, § 11, is the same as that which such a creditor may reach under R. L. c. 142, § 10. "New assets" and "further assets" are substantially the same. Such an interpretation of these terms works uniformity in the principles upon which the rights of creditors of the estates of deceased persons depend and does equal justice to both classes of creditors.

The cases in which this court have considered the statutory provision on this matter so far as respects insolvent estates are very few, and they throw little if any light upon the precise question before us. In *Johnson* v. *Libby*, 15 Mass. 140, it was said by Parker, C. J., that "we can hardly think that the fact of a judgment, recently recovered by the heirs of the intestate, for land to which he had lost his right of entry, can be considered as the discovery of estate not inventoried or accounted for by the administratrix." In *Ostrom* v. *Curtis*, 1 Cush. 461, it was said by Shaw, C. J., that the question whether further assets have come to the hands of the administrator "may be a very difficult question to decide."

The phrase "new assets" occurring in statutes relating to solvent estates has received much more attention. Property recovered by an administrator which was fraudulently conveyed by the intestate has been regarded as new assets. *Holland* v. *Cruft*, 20 Pick. 321. *Welsh* v. *Welsh*, 105 Mass. 229. And so as to a reversionary interest in property conveyed to trustees for the benefit of creditors, which at the time of the debtor's death and long afterwards was supposed to be of no value, and although known to the administrator is not included in the inventory of the estate, but which after eleven years turns out to be more than sufficient to pay the debtor's claim. *Quincy* v. *Quincy*, 167 Mass. 536. In this case Holmes, J., says that the section of the Public Statutes (then Pub. Sts. c. 136, § 11, now R. L. c. 141, § 11) "is a difficult one to construe. It cannot be taken to extend to all cases where tangible property first is received by the executor or administrator after two years, even if not included in the inventory. . . . But, on the other hand, the section must be given a serious meaning, and it would be made almost illusory if construed not to apply to any case where the right

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was vested at the debtor's death." See also *Copeland* v. *Fifield*, 180 Mass. 223.

On the other hand it is held that a mere change in the form of the property does not make "new assets." This principle was applied in *Sturtevant* v. *Sturtevant*, 4 Allen, 122, where the administrator sold out the interest of his intestate in a partnership which had been inventoried, and took in payment notes which were collected more than two years after his appointment; in *Chenery* v. *Webster*, 8 Allen, 76, and in *Alden* v. *Stebbins*, 99 Mass. 616, where land which had been inventoried was sold by the administrator after two years from the time of his appointment under a license of the Probate Court to pay debts; and in *Bradford* v. *Forbes*, 9 Allen, 365, where after two years the executor recovered judgment upon a suit begun by his testator. Striking illustrations of the application of this principle may be found in *Veazie* v. *Marrett*, 6 Allen, 372; *Robinson* v. *Hodge*, 117 Mass. 222, and *Gould* v. *Camp*, 157 Mass. 358. In *Veazie* v. *Marrett*, which was a suit by a belated creditor against an administrator *de bonis non*, it was held that money received by the defendant from a surety upon the bond of the original administrator was not new assets. The ground of the decision was stated by Hoar, J., in the following language: "The original administrator included in the inventory all the estate of the intestate which has ever been discovered. For a part of the estate so inventoried he failed to account, and a suit was brought upon his bond. The property now in the hands of the defendant was received by him from a surety on the bond, in satisfaction of that suit. It is therefore merely the proceeds of the estate embraced in the first inventory, and belongs to the creditors or persons entitled to distribution of the estate not needed for the payment of debts and charges of administration when the plaintiff's claim was barred." In *Robinson* v. *Hodge*, 117 Mass. 222, certain patent rights were inventoried; and it was held that money received by an administratrix after two years from that time from the patent rights, whether as royalties or as proceeds of the sales of rights, was not "new assets." Wells, J., in giving the opinion said: "We infer from the report, and it was so assumed by the argument on both sides, that this money arose from sales or contracts made by the adminis-

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tratrix, or, at least, that it accrued after the decease of the intestate, and that it arose from the inventions mentioned in the inventory. It was the product of the property included in the inventory; and, in the same sense as are the income of stocks and the increase of live animals, it was embraced as a potentiality in the valuation of the patent for the invention. The new form which the property assumed or was converted into did not make it 'new assets' in the sense of the statute. *Sturtevant* v. *Sturtevant*, 4 Allen, 122." In *Gould* v. *Camp*, 157 Mass. 358, the facts are somewhat complicated and will not here be stated. Holmes, J., said: "It is impossible . . . to lay down the universal principle that everything omitted from the inventory by accident or any cause, no matter what, is 'new assets.' . . . Notes and choses in action generally are assets. . . . The chance of getting the proceeds would be 'embraced as a potentiality in the valuation. *Robinson* v. *Hodge*, 117 Mass. 222, 225.'"

It is impossible to give in advance a general definition of either of these terms which shall specifically embrace all the cases properly within it and exclude all others; and the cases must be settled as they arise. Generally, however, it may be said that neither term includes property for which the administrator has been charged in his inventory or otherwise, or the property into which the same or any part thereof has been changed, or the natural increment of such property in the way of interest or otherwise.

Applying these principles to the case before us, it is plain that neither the balance of the former account, nor the proceeds of the judgment recovered against the Lynn Institution for Savings, nor the sum received for tools, nor the money received as interest on the deposit in the Manufacturers' National Bank were further assets. As to the $49.40 recovered against Wilson, there is more doubt. We understand that this was recovered as damages for the breach of a contract to purchase the note and mortgage of the Lynn and Boston Steamboat Company, which note and mortgage were inventoried as worthless. Had the contract for the sale been carried out the proceeds thereof would not have been new assets, and we think that notwithstanding some technical difficulties the sum received for breach

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of the contract may be regarded as in substance a change so far as it goes in the original asset and was not further assets.

As to the sum received in May, 1909, from the sale of an interest in the land on Bloomfield Street and the sum received June 10, 1909, from the sale of an interest in land on Reed Street, there is considerable difficulty. It does not appear at what precise time the sales were made. In the absence of anything to the contrary it is fair to assume that each sale was made at or about the time the proceeds thereof were received. The "second and final account" of the administrator was filed on April 8, 1909, and was allowed on May 8, 1909, nearly four years after his appointment. In neither of these accounts were either of these parcels of land or the proceeds from the sale of them included. The administrator testified that he knew that these parcels belonged to his intestate as early as in the autumn of 1905, some two or three months after filing the inventory, and for a long time before the decree of distribution he had been endeavoring to negotiate a sale of the same to prospective purchasers. If this statement of the administrator is correct, then, although the interest in these lands was not inventoried, yet well within the two years he had them in his control and neither they nor the proceeds of the sale of them were "further assets." But the judge may not have given credit to this testimony of the administrator, and from all the evidence he may have found that knowledge of the interest in these two parcels of land did not come to the administrator until long after the expiration of the two years from the time of his appointment. Under such a finding the sums were "further assets."

It follows that neither the first nor second requests should have been given. And so of the third. It assumes as true the testimony of the administrator.

Exceptions overruled.

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RICHARDSON SHOE MACHINERY COMPANY *vs.* ESSEX MACHINE COMPANY.

Essex. November 2, 1910. — January 3, 1911.

Present: KNOWLTON, C. J., HAMMOND, LORING, SHELDON, & RUGG, JJ.

Contract, Construction, Rescission. *Patent*. *Equity Jurisdiction*, Specific performance, Damages. *Equity Pleading and Practice*, Decree.

Two corporations, which were engaged in producing a cutting press for dieing out uppers of boots and shoes, made an agreement in writing concerning a machine then in process of construction embodying the invention and improvements of a certain inventor, as follows: "Each of the aforesaid companies is to pay one half of all expenses incurred in the making of the experimental machine and any further machines which they may mutually agree upon, and the cost of obtaining patents, etc., and each is to own an undivided half interest in the machines, patents, etc., and neither company is to sell, lease, grant licenses to use, or otherwise dispose of, or make use of its half interest without the written consent of the other company." *Held*, that this contract covered and established the rights of the parties to the invention itself and to the application for a patent as well as to the patent when that should have been obtained, that the subject matter of the agreement was not limited to the experimental machine mentioned, and that the agreement could not be regarded as merely a license.

Cases cited by SHELDON, J., upon the point that an inventor or his assignee before the issuing or the allowance of a patent has an inchoate right of property in his invention and in a pending application for a patent, which he may assign or otherwise deal with as an article of property.

In a suit in equity to compel the specific performance of an agreement in writing, if the defendant contends that the contract sought to be enforced was rescinded, but it appears that after the time of the alleged rescission the plaintiff and the defendant both treated the contract as still in force and respectively performed their obligations under it in accordance with its terms, that neither of them acted in any respect as if the contract had been done away with and that no assertion to that effect was made by the defendant until shortly before the filing of the bill, the defense of rescission cannot be sustained.

It is settled that an application for the specific performance of any agreement is addressed to the discretion of the court, to be exercised upon equitable considerations in view of all the circumstances of the particular case.

In a suit in equity by one corporation against another, to compel the specific performance of an agreement in writing concerning a cutting press for dieing out uppers of boots and shoes, which then was in process of construction, embodying the invention and improvements of a certain inventor, it appeared that, at and before the time of making the agreement, the plaintiff was engaged in selling sewing machines for the manufacture of shoes, that these machines were made for the plaintiff by the defendant, and that the object of the parties in making the agreement was to obtain a machine to be manufactured by the defendant and sold by the plaintiff to the profit of both of them, and to make

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provision that this new machine should be manufactured and sold only by themselves and should not be available for their competitors in business, the principal one of such competitors being a certain corporation called the United Company, that afterwards the United Company became the owner of all the property of the plaintiff except the contract sought to be enforced, and also acquired and held all the capital stock of the plaintiff, so as to dominate and control its future action, and that the suit to compel specific performance of the agreement was brought in the name of the plaintiff for the benefit of the United Company. *Held*, that under the circumstances shown the enforcement of the agreement would operate in a manner different from that intended by both parties when the agreement was made, the acts of the plaintiff after its making having destroyed the common purpose of the parties, so that a specific performance ought not to be decreed.

In a suit in equity brought in the Superior Court by one corporation against another to enforce the specific performance of a contract, where it appeared that, although the plaintiff had offered to do all that was required of it by the contract and the defendant had refused performance, a change in the relation of the parties to each other after the making of the contract made a decree for its specific performance inequitable, this court ordered that the bill should be dismissed without prejudice to an action at law, unless the plaintiff should request the Superior Court to retain the bill for an assessment of damages and the Superior Court should see fit to grant its request.

BILL IN EQUITY, filed in the Superior Court on November 20, 1909, to enforce the specific performance of the following agreement in writing:

"Whereas the Essex Machine Co., and the Richardson Shoe Machinery Co., both of Lynn, Mass., are engaged in producing a Cutting Press for Dieing out Uppers of Boots and Shoes: It is hereby agreed as follows:

"Each of the aforesaid Companies is to pay one half of all expenses incurred in the making of the experimental machine and any further machines which they may mutually agree upon, and the cost of obtaining patents, etc., and each is to own an undivided half interest in the machines, patents, etc., and neither Company is to sell, lease, grant licenses to use, or otherwise dispose of, or make use of its half interest without the written consent of the other Company.

"Signed this 27th day of April 1908.

"Essex Machine Co.,
Geo. A. Fuller Treas.
"Richardson Shoe Machinery Co.
by J. H. Richardson Mg."

R. S. M. Co.
Seal

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The case was heard by *Fessenden*, J., who reserved and reported the evidence and all questions of law in the case for determination by this court.

W. B. Farr, (*N. B. Todd* with him,) for the plaintiff.

W. Quinby, (*M. B. May* with him,) for the defendant.

SHELDON, J. It is undisputed that the agreement now sought to be enforced was made concerning the machine then in process of construction and embodying the invention and improvements of Reed, which is mentioned in the plaintiff's bill. The plaintiff contends that by the correct construction of this agreement it is now entitled to a decree declaring that it is jointly interested with the defendant in the invention and improvements, and ordering the defendant to assign to it a one half interest therein and in the application for letters patent now pending in the name of the defendant as assignee of Reed. The defendant rests its contention that no such decree should be entered, upon the grounds that the agreement was not to be carried out and cannot be enforced until letters patent upon the invention shall have been actually issued, that there is no agreement to assign anything, that the alleged agreement is only a license and has as yet no other subject matter than an experimental machine, which is of no value; and that before the assignment made by Reed to the plaintiff the agreement was rescinded and abrogated by the parties and is no longer in existence. It is also suggested that the agreement, if otherwise valid and enforceable, yet ought not to be specifically enforced in equity, for the reason that since it was made the United Shoe Machinery Company has become the owner of the entire capital stock of the plaintiff, and all the tangible property of the latter except this agreement has been transferred to that company (hereinafter called the United Company), the plaintiff having been theretofore a competitor in business of the United Company; that this suit is now prosecuted at the instance and really for the benefit of the United Company, and that the result of its success would be and is intended to be to prevent the defendant from putting upon the market the new machines in competition with those of the United Company, or at least materially to hamper the efforts of the defendant in that direction, whereas the main object of both the plaintiff and the defendant in making the agreement was to

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enable them, the one as the manufacturer and the other as the seller of the projected machines, to compete better and more advantageously with the United Company.

1. In our opinion, the agreement in question was designed to make the parties the equal owners of both the invention and of any letters patent that might be issued thereon. Each of them was to pay one half of the cost of constructing the experimental machine and of any other machines that might be agreed upon. They were to contribute equally to the cost of obtaining patents. Each was to own an undivided half interest in the machines and the patents. It was clearly contemplated that the title to the invention itself as well as to the patent that might be obtained thereon should be vested by proper instruments of assignment or otherwise in both parties, and that, except as limited by the terms of the agreement itself, each one should have the power to deal with its own interests; for there was an express stipulation that neither party should sell or lease its half interest or grant any licenses thereunder or make any other use or disposition thereof without the written consent of the other party.

The inventor or his assignee has before the issuance or allowance of a patent an inchoate right of property in his invention and in a pending application for a patent, which he may assign or with which he may deal as an article of property. *Somerby* v. *Buntin*, 118 Mass. 279. *Adams* v. *Messinger*, 147 Mass. 185. *Currier* v. *Hallowell*, 158 Mass. 254, 255. *Lamson* v. *Martin*, 159 Mass. 557, 562. *Burton* v. *Burton Stock Car Co.* 171 Mass. 437. *Gaylor* v. *Wilder*, 10 How. 477. *Runstetler* v. *Atkinson*, MacArthur & M. 382. The assignments or licenses which might have been made by the parties under this agreement could have been made before as well as after the actual issuance of the patent or even the filing of the application therefor. It seems plain to us that the agreement must be construed to cover and establish the rights of the parties to the invention itself and to the application for a patent as well as to the patent when that should have been obtained.

2. For the same reasons the subject matter of the agreement is not limited to the experimental machine therein mentioned; and it would not be material to determine the value of that

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machine. Nor can the agreement be regarded as merely a license.

3. Upon the evidence it does not satisfactorily appear that the agreement has been abrogated or rescinded. The defendant relies mainly upon the fact that when the application was about to be made Richardson, who represented the plaintiff, caused two assignments to be drawn, each transferring a one half interest in the invention, the application, and the patent to be issued thereon, and running respectively to the plaintiff and the defendant. The agreement now in suit was shown to Reed the inventor, and he was requested by Richardson to execute the assignments in order to carry out the intent of the agreement. Reed however refused to do so, and declared that he would not assign his invention to any one while that agreement remained in force. Richardson said that he desired only the agency to sell the proposed machines, or as one witness put it, that he merely "wanted the selling end." Reed also said that he would not assign to the Richardson Company at all, and that he would assign to the defendant only if that agreement was done away with. Richardson made no reply to this, and thereupon Reed made the assignment to the defendant. It does not appear that Reed was under any obligation to assign his rights to either of the parties; indeed, there are in the evidence some intimations to the contrary; and it cannot be presumed that there was such an obligation. *American Circular Loom Co.* v. *Wilson*, 198 Mass. 182, 201.

The question presented is very different from what it would be if this suit were against Reed. In that event it might forcibly be contended that Reed's action had been induced by the silence and apparent acquiescence of the plaintiff acting through Richardson, and that the plaintiff could not now assert against Reed that the agreement remained in force. But Reed is not a party to this suit; he has not sought to intervene and no present rights of his are shown to be involved in it. He has parted absolutely with his right to control the invention and the patent that may be obtained thereon, and is not concerned with any future disposition that may be made thereof. The only question is between the plaintiff and the defendant; and the contention that they have abrogated the agreement can be estab-

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lished only by proof that the minds of both of them have met in an assent to that proposition, or that the plaintiff is estopped as to the defendant to deny that there has been such an assent. *Banewur* v. *Levenson*, 171 Mass. 1, 12. *Rollins* v. *Marsh*, 128 Mass. 116, 120. Undoubtedly we must consider what took place, as already stated, just before the assignment to the defendant was made; but this is only one item of evidence. After the defendant had taken its assignment, and after the alleged rescission of the agreement, both parties treated it as still in force. Various items of expense incurred in prosecuting the application for a patent or for labor and materials upon the machine or models thereof were paid by one party and contributed to by the other, as was called for by the agreement. Neither of them acted in any respect as if the agreement had been done away with. No such assertion was made by the defendant until the fall of 1909, shortly before the filing of the bill. This ground of defense must fail.

4. At and before the time of making this agreement the plaintiff was engaged in selling a sewing machine for the manufacture of shoes, and these machines were made for it by the defendant. The plaintiff had also the American agency for selling an English machine used in that manufacture, called a "clicking press"; and Reed's invention was for an improved clicking press. It appears from the evidence that the object of the parties to the agreement was to obtain a new clicking press, which should be manufactured by the defendant and sold by the plaintiff to the profit of both parties, and to make it certain that this new machine should be used only by themselves and should not be available to their competitors in business, the principal one of those competitors being the United Company. In other words, one of the leading motives of both parties in making the agreement was to enable them, in their respective domains of seller and manufacturer, to compete more successfully with the United Company. But plainly the carrying out of this purpose under the agreement will be materially impeded and probably wholly prevented by the fact that the United Company has now not only become the owner of all the property of the plaintiff except this agreement, but also has acquired and now holds all the capital stock of the plaintiff, and so wholly dominates and controls its

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future action. It is true that the plaintiff's corporate identity remains unchanged, and that the plaintiff offers to do all that is required of it by the terms of the agreement. But it still remains true that the object which was in the minds of the parties, the object which it was their main purpose to achieve in making the agreement, will no longer be attained, will probably be made incapable of attainment, if the agreement is specifically enforced. Under such circumstances specific performance ought not to be decreed.

It is settled that an application for the specific performance of any agreement is addressed to the judicial discretion of the court, to be exercised upon equitable considerations in view of all the circumstances of the particular case. *Curran* v. *Holyoke Water Power Co.* 116 Mass. 90. *Thaxter* v. *Sprague*, 159 Mass. 397. The fact that an agreement would now operate in a manner different from what was present in the minds of both parties when it was made is of itself a sufficient reason for refusing specific performance. *Western Railroad* v. *Babcock*, 6 Met. 346, 352. *Lee* v. *Kirby*, 104 Mass. 420, 427. This is the underlying doctrine of such cases as *Cawley* v. *Jean*, 189 Mass. 220, 225; *Lamson* v. *Martin*, 159 Mass. 557, 562; and *Chute* v. *Quincy*, 156 Mass. 189. This case is not one in which the purpose of only one party unknown to the other will be frustrated, as in *Morley* v. *Clavering*, 29 Beav. 84; *Adams* v. *Wear*, 1 Bro. Ch. 567; and *Hickson* v. *Clarke*, 25 Grant Ch. 173. Here the common purpose of both parties has been destroyed by the act of the plaintiff after the agreement was made. That this is a sufficient reason for refusing specific performance is manifest. *Stone* v. *Pratt*, 25 Ill. 25. *Gotthelf* v. *Stranahan*, 138 N. Y. 345. *Bradford, Eldred & Cuba Railroad* v. *New York, Lake Erie & Western Railroad*, 123 N. Y. 316, 326. *Wadick* v. *Mace*, 191 N. Y. 1. *Waters* v. *Howard*, 8 Gill, 262, 281. *Pingle* v. *Conner*, 66 Mich. 187, 193.

The bill must be dismissed without prejudice to an action at law, unless the plaintiff shall request the Superior Court to retain the bill for an assessment of damages and that court shall see fit to grant its request. *Banaghan* v. *Malaney*, 200 Mass. 46.

So ordered.

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RANSOME ROWE & another *vs.* INHABITANTS OF PEABODY. INHABITANTS OF PEABODY *vs.* UNITED STATES FIDELITY AND GUARANTY COMPANY.

Middlesex. November 9, 1910. — January 3, 1911.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Contract, Performance and breach. *Municipal Corporations. Bond. Surety. Damages*, In contract. *Interest.*

One who contracts absolutely to do a certain thing which is lawful is not to be excused for non-performance merely because performance originally was or has become impossible.

A contractor agreed in writing with a town to construct a tunnel of the length of fifteen hundred and fifty feet to hold a masonry conduit thirty inches in diameter "by the use of timber props, roof supports and lagging." The specifications contained the statement that the underground plot had not been investigated and that the committee acting for the town expressly denied any responsibility for its character. The contract provided that the contractor should bear all loss resulting to him from the character of the work or because of the nature of the ground being "different from what was estimated or expected." The character of the soil through which the tunnel was to be constructed proved to be such that the construction of the tunnel was impossible unless at a cost to the contractor greatly exceeding the contract price. The contractor on discovering the difficulties refused to perform his contract. *Held*, that the practical impossibility of the performance of the contract did not excuse the contractor from his obligation to construct the tunnel according to the specifications for the price named, and that he must respond in damages for his failure to do so.

Where a committee on water supply of a town consisting of seven members, of whom one is the chairman, have authority to make a contract for the construction of a tunnel to hold a conduit for the waterworks of the town, and make such a contract, which the contractor afterwards abandons on finding the difficulties so great that it can be performed only at an excessive loss to him, no waiver of or change in the terms of the contract can be made in behalf of the town by the chairman of the committee except so far as authority to do this has been given to him by his associates, who together with the chairman have power to act for the town only as a collective body.

In an action by a town against the surety on the bond of a contractor, who had made a contract to construct a tunnel to hold a conduit thirty inches in diameter for the waterworks of the town, which contract he afterwards had abandoned on finding the difficulties so great that the construction of the tunnel was impossible except at a cost to him greatly exceeding the contract price, it appeared, that the method of construction required by the contract was by the use of timber supports, and that after the contractor abandoned the contract the town completed the tunnel by pneumatic construction at a necessary cost of nearly $48,000 more than the contract price for the timber construction, and that it was necessary in order to use the pneumatic method of construction to

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make the diameter of the tunnel forty-eight inches instead of thirty inches, although the greater diameter was of no advantage to the town after the tunnel was finished. The pneumatic method of construction was essentially different from that originally contracted for, but it was the cheapest and the most expeditious method of constructing the tunnel. *Held*, that the town, not having received from the contractor the tunnel which he had agreed to furnish, was entitled to hold him and the surety on his bond liable for the necessary cost of obtaining such a tunnel in excess of the original contract price; that the town had obtained such a tunnel as it needed at the smallest possible cost, which was much less than would have been required to procure one constructed in the manner contracted for, and the fact that in doing this the town had been forced to acquire a tunnel somewhat larger than that contracted for and different in its method of construction did not diminish the damages to which the town was entitled, as the larger tunnel served the purpose of the town no better than one of the size specified in the contract would have done and it could not have been built smaller by the method of construction that was used, this method having lessened the burden of the damages for which the contractor and the surety on his bond were liable.

Where, in an action against the surety on a bond given to secure the faithful performance of a contract, the penalty of the bond is less in amount than the damages which in equity and good conscience the plaintiff is entitled to recover, interest should be allowed upon the amount of such penalty.

TWO ACTIONS OF CONTRACT, the first action by Ransome Rowe and Bonfiglio Perini, contractors, against the town of Peabody on an account annexed for work, labor, materials and machinery alleged to have been furnished to the defendant in the construction of a tunnel for its waterworks, and the second action by the town of Peabody against the United States Fidelity and Guaranty Company, a corporation, as surety on a bond given by the plaintiffs in the first action to secure their performance of a contract in writing with the town to construct a tunnel to contain a conduit for the waterworks of the town. Writs dated respectively January 4, 1907, and February 15, 1907.

The answer of the town in the first case set up the defense that all the work done and all the materials furnished by the plaintiffs were so done and furnished under a contract in writing which the plaintiffs had failed to perform and afterwards expressly abandoned.

In the Superior Court the cases were tried together before *Fox*, J. The facts which appeared in evidence or could have been found upon the evidence are stated in the opinion.

The following extracts from the specifications of the contract made by the plaintiffs in the first case for the building of the tunnel relate to matters mentioned in the opinion.

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From article six: "Sec. 2. The work to be done consists in excavating and constructing masonry in tunnel for a distance of fifteen hundred and fifty feet. . . .

"The contractor shall furnish all materials and labor, except as otherwise specified, necessary to complete the work in accordance with the terms of this contract and the requirements of the engineer hereunder.

"Sec. 3. The nature of the underground plot has not been investigated and the committee expressly denies any responsibility for its character."

From article twenty-three: "The contractor shall take all responsibility of the work and shall take all precautions for preventing injuries to persons and property about the work; shall bear all losses resulting to him on account of the amount or character of the work, or because of the nature of the ground, in or on which the work is done is different from what was estimated or expected, or on account of the weather, elements, or other causes."

In the first case, brought by the contractors, the following stipulation was filed:

"It is agreed in the above entitled cause that the actual cost to the town of Peabody for constructing the Suntaug Aqueduct, in connection with which the contract between Rowe and Perini with the town of Peabody was made, was $47,805.12 in excess of the contract price for such work as the said Rowe and Perini agreed to perform under the contract, and if the defendant is entitled to damages by way of recoupment against the plaintiff, then the amount thereof shall be assessed at $47,805.12, but it is not conceded on the part of Rowe and Perini that the cost of performing the work by the town is material."

In the second case, brought by the town against the surety on the bond given by the contractors, the following stipulation was filed:

"It is agreed that the above entitled action may be transferred to the county of Middlesex, and may be tried at the same time with the case entitled Ransome Rowe *et al.* *v.* Town of Peabody.

"It is further agreed that if the town of Peabody is entitled to recoup in the said case of Ransome Rowe *et al.* *v.* Town of Peabody, the cost to the town for constructing the Suntaug Aqueduct,

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which it is agreed was $47,805.12, in excess of the contract price for such work as was covered by the contract, and if the defendant in this action is liable on the bond sued on therefor to the extent of said bond, that said amount of $47,805.12 may be apportioned first by way of recoupment in the above case of Ransome Rowe *et al. v.* Town of Peabody and thereafter be recovered in this action."

In the first case the judge made the following rulings requested by the plaintiffs:

"1 a. The contract of July 25, 1905, required as essential conditions the construction of a tunnel thirty inches in diameter by the use of timber props, roof supports and lagging. It was not a contract for constructing a suitable tunnel by whatever method should become available."

"2. Under that contract neither the engineer nor the town water committee had power to require the contractors, without their consent, to construct a tunnel by pneumatic process forty-eight inches in diameter. Such requirement would not be a mere variation in form and dimensions which the contractors must adopt receiving compensation under the 'extra work' clause. but would be the substitution of a different contract."

The judge refused to make the other rulings requested by the plaintiffs in the first case, which were as follows:

"1 b. The contractors were not required at all events to construct a tunnel at least thirty inches in diameter. If it was or became impossible to construct a tunnel of substantially thirty inches diameter by timber method, such impossibility is an excuse to both parties, unless one of the parties insured that it could be done.

"1 c. Neither the town nor the contractors insured or guaranteed that a thirty inch timber tunnel could be built on the line and grade of the plans."

"3. If the jury find that the construction of a thirty inch timber tunnel became impossible, upon cessation of work thereon, neither party would have a right of action against the other for breach of contract, but the contractors would have a right to be paid the reasonable value of their work and materials in excavating the shafts and excavating for the gate house.

"4. Whether or not it became impossible to construct a thirty

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inch timber tunnel, it is a question for the jury to determine whether in October and November, 1905, both parties waived their possible contentions under the contract of July 25, 1905, and went on with the work of constructing a water supply system under a new arrangement.

"5. If the jury find that the obligations of the contract of of July 25, 1905, were waived by both parties, it is a question for the jury to determine whether or not there was any definite agreement between the water committee and Rowe and Perini as to payment for this previous labor and materials in excavating the shafts and gate house foundations, and for this machinery and tools; and if so, what that agreement was.

"6. If the jury find that the obligations of the contract of July 25, 1905, were waived and that there was no definite agreement as to such payment, Rowe and Perini are entitled to reasonable compensation for such labor, materials, machinery and tools.

"7. The performance of the substituted arrangement abrogated the original contract, since there is no evidence that the new contract was not intended to be a discharge of claim that contractors had broken the contract.

"8. It is a question for the jury whether the mutual obligations of the old contract were waived by the parties in entering into the new arrangement which Rowe acted upon."

In the second case the defendant asked the judge to make the following rulings:

"1. Upon all the evidence the plaintiff is not entitled to recover upon the bond in this case.

"2. The town of Peabody by its dealings with Rowe and Perini in October, 1905, waived all its rights, if any, against the United States Fidelity and Guaranty Company.

"3. If the jury find that it was impossible to build a thirty inch timber tunnel as contemplated in the contract of July 25, 1905, by reason of such impossibility the United States Fidelity and Guaranty Company came under no liability to the town of Peabody on its bond.

"4. If the court rules that the town of Peabody is entitled to recover from the United States Fidelity and Guaranty Company upon said bond there is no evidence of damage to the

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town by reason of any alleged breach of said bond. The cost of completing the Suntaug aqueduct after October 17, 1905, is not the measure of damages."

The judge refused to make any of these rulings.

In the first case the judge ordered a verdict for the defendant. In the second case he ordered a verdict for the plaintiff in the sum of $5,540, which was the amount of the penalty of the bond with interest. The plaintiffs in the first case and the defendant in the second case alleged exceptions.

C. F. Choate, Jr., for the plaintiffs in the first case and the defendant in the second case.

B. N. Johnson, (*S. H. Donnell* with him,) for the town of Peabody.

SHELDON, J. The plaintiffs in the first action, hereinafter called the contractors, made in July, 1905, an agreement with the town of Peabody for the building of a tunnel from Suntaug Lake for a distance of fifteen hundred and fifty feet, and for the laying of certain pipe and the performance of other specified work. The contractors were to do all the work and supply the materials, so as to furnish to the town a completed tunnel with all its equipment, and were to be paid fixed prices for the different parts of what they were to do. They gave to the town a bond with the defendant in the second action as surety, conditioned for their faithful performance of the contract. The work was to be a timber supported tunnel, in which was to be constructed a masonry conduit thirty inches in diameter. The judge instructed the jury that the contract required as essential conditions "the construction of a tunnel thirty inches in diameter by the use of timber props, roof supports and lagging. It was not a contract for constructing a suitable tunnel by whatever method should become available." He further ruled that under the contract the officers acting for the town had no power "to require the contractors, without their consent, to construct a tunnel by pneumatic process forty-eight inches in diameter. Such requirement would not be a mere variation in form and dimensions which the contractors must adopt, . . . but would be the substitution of a different contract." Both of these rulings were made at the request of the contractors and apparently without objection by any party. They must now be taken

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as correct. *MacKnight Flintic Stone Co.* v. *New York*, 160 N. Y. 72.

The contractors began to construct the tunnel as required by the contract, but presently found that owing to the nature of the soil there were serious difficulties, so great, they contended, as to make the construction in that way practically impossible, and certainly so great as to make it impracticable without a very large and disproportionate expense, such as they were not able to incur. Finally, on October 27, after some negotiations with the engineer and with the committee of the town, which so far as necessary will be referred to hereafter, the contractors sent to the committee a letter formally abandoning the contract. The town then completed the tunnel by what is called the pneumatic construction, which necessarily involved a cost of $47,805.12 in excess of the contract price. It was also necessary under this mode of construction to make the diameter of the tunnel forty-eight inches instead of thirty inches. This mode of construction, as already pointed out, was essentially different from that originally contracted for; but it does not seem to have been disputed that if not the only practicable method, it was at least the cheapest, most expeditious and most economical method by which the tunnel could be constructed.

The first contention made in behalf of the contractors is that the performance of their contract was impossible, or at least that it might have been found by the jury to be impossible, and that for this reason the contract was no longer binding upon the parties. They argue that a contract to build a particular tunnel of specified dimensions by a described method of construction is like a contract to ship goods by a certain steamer, or to sell potatoes to be raised upon certain specified land, or to account for the proceeds of butter to be made in a certain factory, or to build a bridge by the caisson method, — in each of which cases it has been held that the continued existence of the subject matter of the contract or the continued practicability of the essential details that are stipulated for is an implied condition of the continued validity of the agreement. *Krell* v. *Henry*, [1903] 2 K. B. 740. *Chandler* v. *Webster*, [1904] 1 K. B. 493. *Howell* v. *Coupland*, 1 Q. B. D. 258. *Stewart* v. *Stone*, 127 N. Y. 500. *Buffalo & Lancaster Land Co.* v. *Bellevue Land &*

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Improvement Co. 165 N. Y. 247. *Lovering* v. *Buckmountain Coal Co.* 54 Penn. St. 291. This is the same principle which we recently considered in *Hawkes* v. *Kehoe*, 193 Mass. 419. It has frequently been applied in the courts. See, besides the cases already cited, *Angus* v. *Scully*, 176 Mass. 357; *Butterfield* v. *Byron*, 153 Mass. 517; *Elliott* v. *Crutchley*, [1903] 2 K. B. 476; *McKenna* v. *McNamee*, 15 Canada S. C. 311. But the question is as to the construction of the contract which the parties have made. This was recognized in most of the cases above cited. One who chooses to contract absolutely for the performance of a certain thing is not to be excused from such performance, in the absence of any other ground, merely because it either was originally or has since become impossible of execution. As was said by Blackburn, J., in the leading case of *Taylor* v. *Caldwell*, 3 B. & S. 826, 833, "where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents the performance of his contract has become unexpectedly burdensome or even impossible." This also has been frequently declared by the courts. *Jones* v. *St. John's College*, L. R. 6 Q. B. 115, 127. *Paradine* v. *Jane*, Aleyn, 26. *Atkinson* v. *Ritchie*, 10 East, 530. *Hills* v. *Sughrue*, 15 M. & W. 253. *Harvey* v. *Murray*, 136 Mass. 377. *Drake* v. *White*, 117 Mass. 10. *Stees* v. *Leonard*, 20 Minn. 494. As was said by the present Chief Justice in *Butterfield* v. *Byron*, 153 Mass. 517, 520, "the fundamental question . . . is, What is the true interpretation of the contract?"

In the case at bar the contract expressly stated that the nature of the underground plot had not been investigated, and that the committee of the town denied any responsibility for its character. The contractors also agreed by the twenty-third article of the contract to take all responsibility for the work and to bear all losses resulting on account of its nature or character or because of the nature of the ground being different from what was estimated or expected. The difficulties which it was asserted made the prescribed mode of construction impossible arose wholly from the character of the soil beneath the surface. They were warned that there might be such difficulties, and no one could say in advance that these might not be very great, or even in-

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superable. But they chose to make their agreement an absolute one, and the court cannot relieve them from the bargain which they saw fit to make. The case is well within the decisions. *Boyle* v. *Agawam Canal Co.* 22 Pick. 381. *Dermott* v. *Jones*, 2 Wall. 1. *Eastman* v. *St. Anthony Falls Water-Power Co.* 24 Minn. 437. *Thorn* v. *Mayor of London*, L. R. 9 Ex. 163; L. R. 10 Ex. 112; 1 App. Cas. 120. There are three English cases, decided respectively in the House of Lords and in the Court of Appeal, which resemble closely the case at bar. *Jackson* v. *Eastbourne Local Board*, 2 Hudson, Building Contracts, (3d ed.) 67; *Bottoms* v. *Lord Mayor of York*, 2 Ibid. 220; and *McDonald* v. *Mayor of Workington*, 2 Ibid. 240. In the first of these cases, Lord Esher said in the Court of Appeal: "When a man is asked to tender upon specifications, he must inquire whether it is possible for him to do the work which he engages to do, and if he does not then find out that it is impossible, he is not excused by reason that, from the difficulty of the works, it is afterwards found impossible. He has contracted to do it, and must fulfil his contract."

We are clearly of opinion that these contractors were not excused from the performance of their agreement by reason of its alleged impossibility, but that they were bound either to accomplish what they had promised to do or to respond in damages for their failure.

But it is contended that the town did not choose to stand upon its rights but waived performance by the contractors of the unfortunate obligation into which they had entered, and that it made a new arrangement with them, under which they were to construct another and different tunnel. The original contract, it is contended, was annulled or rescinded by mutual consent, and the parties now stand as if no such contract had been made.

It was competent for the parties to do this if they chose to do so; and under the circumstances of this case, considering the changed relations of the parties and the proposed modifications of the work to be done, there would be a sufficient consideration for the abandonment of the original contract and the substitution of a new arrangement. *Munroe* v. *Perkins*, 9 Pick. 298. *Rogers* v. *Rogers & Brother*, 139 Mass. 440. *Alden* v. *Thurber*, 149 Mass. 271. *Thomas* v. *Barnes*, 156 Mass. 581. *Stebbins* v.

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Conners Brothers Construction Co. 202 Mass. 153. *Hanson & Parker* v. *Wittenberg*, 205 Mass. 319.

Some efforts were made by the parties towards effecting a new arrangement. In these, as in all matters respecting the construction of the tunnel, the town acted through its committee on water supply, which consisted of seven persons and of which one Walker was chairman. Its power to bind the town was not disputed. On September 29, 1905, after the development of the conditions which impeded further progress under the terms of the contract, Barbour, the engineer of the town, wrote a letter to Walker, in which, besides stating these difficulties and the possibility that the contractors might throw up their work, he said: "In view of this possibility the question arises as to whether it will not pay the town of Peabody to make some arrangement with Rowe and Perini so that they can proceed with the work. I am satisfied that they are as well able to do this tunnel work as any one we could obtain. The cost to the town will unquestionably be much greater than originally bid. In considering any such idea it must be clearly borne in mind that we cannot make any proposition to Rowe and Perini without making the bond company a party of the same by a written agreement, otherwise there would be great danger of nullifying the bond." In October, the contractors reached the conclusion that they could not construct the tunnel according to the plans and specifications. There was evidence that Barbour suggested to Rowe, one of the contractors, that the town should continue the work, employing Rowe as its superintendent at a salary and making certain allowances to the contractors for what they had done. There was a meeting of the committee on October 17, and Rowe testified that on the next morning he talked over a telephone with Walker, and that in answer to Rowe's question Walker said that the committee had decided to go ahead with the work as suggested by Barbour, and added, "Go on with the work, Mr. Rowe, give us the water as soon as you can and save all the money you can for the town of Peabody"; that Rowe assented to this, and put his men at work.

At the meeting of the committee on October 17, which has been mentioned, a vote was passed "that the chairman be authorized to make a contract with Mr. Rowe to continue the work

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on a cost basis, all loss on the contract to the present time to be borne by the contractors, that Mr. Rowe be allowed six dollars ($6) per day for his salary as superintendent, that the surety company be informed of the change in the contract and it is understood they will consent to the change. It shall be agreed to by Mr. Rowe that this supplementary contract can be annulled by the committee at any time." The arrangement which had been suggested by Barbour to Rowe, and which the contractors said was agreed upon between Walker and Rowe, did not conform to the terms of this vote. There was no evidence that Rowe's alleged conversation with Walker was known to any other member of the committee or that the new arrangement alleged thus to have been made was communicated to any other member, or that it ever was assented to or ratified by any of them, either individually or at any meeting of the committee. Not only did Walker himself testify that he made no such agreement with Rowe (which testimony of course would present merely a question for the jury), but each member of the committee testified that he never authorized or heard of any such agreement; and there was no evidence to the contrary. Under these circumstances, even if the testimony of Rowe had been believed by the jury, they would not have been warranted in finding that the town was at all bound by Walker's action in attempting to make a new agreement. The authority to speak for the town was in the committee as a collective body; no such authority could be found to have existed in any one member thereof, except as it might have been given to him by his associates. *Murdough* v. *Revere*, 165 Mass. 109. *Shea* v. *Milford*, 145 Mass. 528. *Haven* v. *Lowell*, 5 Met. 35. See *Damon* v. *Framingham*, 195 Mass. 72, 78. Nor is there to be found in this long bill of exceptions any evidence that such a new agreement as Walker was authorized by the vote of the committee to make was ever in fact made by him with the contractors or either of them. Under these circumstances we must regard the rights of the parties as fixed by the letter of Rowe abandoning the contract and the reply made by the committee in their letter of November 2. There was no evidence that the town had waived the obligations of the contractors.

We need not consider the contractors' requests for rulings in

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detail. They are all disposed of by what has been said. We find no error in the action of the judge.

The second action was brought by the town against the surety upon the bond given by the contractors. Most of the questions raised in this action have been sufficiently discussed.

The cost of the tunnel actually constructed was more than $47,000 in excess of the contract price for what was to have been done by the contractors. Upon a careful examination of the evidence and the contentions made at the trial, as well as the very elaborate and learned arguments which were made before us, we are satisfied that all parties then conceded that the mode of construction adopted by the town was the cheapest and most advantageous one that could have been devised. This resulted in giving to the town a larger tunnel than had been contracted for or than was needed or desired by the town; but it sufficiently appears that it was of the smallest size that could have been made by the best and cheapest method of making any tunnel in this location. The town, not having received the tunnel which the contractors had agreed to furnish and which their surety had agreed that they should furnish, was entitled to hold them for the cost of obtaining such a tunnel. *Florence Machine Co.* v. *Daggett*, 135 Mass. 582. *Hills* v. *Sughrue*, 15 M. & W. 253. But it was the duty of the town to take all proper measures to diminish this *quantum* of damages. *Loker* v. *Damon*, 17 Pick. 284, 288. *Cavanagh* v. *Durgin*, 156 Mass. 466. *Ingraham* v. *Pullman Co.* 190 Mass. 33. *Sullivan* v. *Old Colony Street Railway*, 200 Mass. 303, 309. This it has done. It has obtained a tunnel such as it needed and in its main features such as it was entitled to under the contract, at a cost much less than would have been needed to procure the one contracted for. That in doing this it has been forced to receive a tunnel somewhat larger than was contracted for and somewhat different in its method of construction does not necessarily diminish its damages, especially where this has materially lessened the burden upon those who are answerable to it. Instead of being injured, the latter gain an advantage from the course which has been adopted, and they cannot be heard to complain thereof.

The penalty of the bond was less than the amount of the damages to which the town was entitled in equity and good

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conscience. For this reason, interest was rightly allowed upon that penalty. *Bank of Brighton* v. *Smith*, 12 Allen, 243, 251. *Bassett* v. *Fidelity & Deposit Co.* 184 Mass. 210, 216. *Sampson Co.* v. *Commonwealth*, 202 Mass. 326, 339.

The exceptions in each case must be overruled.

So ordered.

MARY GILLIS *vs.* CAMBRIDGE GAS LIGHT COMPANY.
COLIN F. GILLIS *vs.* SAME.

Middlesex. November 9, 1910. — January 3, 1911.

Present: KNOWLTON, C. J., MORTON, LORING, & SHELDON, JJ.

Negligence, In use of coal hole. *Coal hole*. *Agency*, Scope of employment.

In the absence of any custom or understanding in regard to the matter, there is no rule of law which requires a coal dealer, when by his servant he has been delivering coal or coke through a coal hole in a public sidewalk on the premises of a customer, to see that the cover of the coal hole is replaced, when the customer himself as the owner or the occupant of the premises has undertaken in person or by his servant to attend to the removal and the replacement of the cover.

If the driver of a team of a coal dealer, who has been instructed by his employer not to remove or replace or touch any covers of coal holes and not to attempt to sweep or clean any rims of coal holes into which covers fit, while engaged in delivering coal or coke through a coal hole in a public sidewalk on the premises of a customer of his employer, who as the owner or occupant of the premises has undertaken in person or by his servant to attend to the removal and the replacement of the cover, joins with the servant of the owner or occupant in undertaking to replace and secure the cover of the coal hole and does this negligently, causing injury to a person travelling on the highway in the exercise of due care, it here *was intimated*, that the coal dealer perhaps might be held liable for the consequences of his servant's negligence.

MORTON, J. These cases were here on the plaintiffs' exceptions to a ruling directing verdicts for the defendant, and are reported in 202 Mass. 222. The exceptions were sustained and the case was sent back for a new trial. At that trial * the jury found for the defendant, and the case is now here on exceptions by the plaintiffs to the refusal of the presiding judge to give certain rulings that were requested by them and to the instruc-

* Before *White*, J.

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tions that were given in relation to the matter to which the rulings that were requested related.

The female plaintiff, whom we shall speak of as the plaintiff, in passing along Temple Place, a public street in Boston, slipped upon the cover of a coal hole, which gave way and precipitated her into the coal hole, causing the injuries complained of. Some four or five hours before the accident, the defendant, pursuant to an order from the owner and occupant of the premises to which the coal hole belonged, had delivered a load of coke which had been put in through the coal hole into which the plaintiff fell. There was only one person, the driver, with the team that delivered the coke, and the uncontradicted evidence shows that he did not remove or replace or touch the cover, or attempt to sweep or clean the rim or rabbet of the hole into which the cover fitted, and that he was instructed by his employer not to do any of those things. It appeared that the cover was removed by one McElman, an engineer in the employ of the owner and occupant of the premises, to whom the coke was delivered, and was replaced and fastened by him after sweeping out the rabbet, and that in doing this he acted under and pursuant to the instructions given him by the owner and occupant of the premises. It also appeared that McElman stood by the coal hole while the coke was being put in. The plaintiff contends that notwithstanding the instructions that were given to the driver it was the duty of the defendant and its servants to see that the rabbet into which the cover fitted was cleaned out and that the cover was properly replaced and securely fastened after the coke was delivered; and that was in substance what she requested the presiding judge to instruct the jury. The presiding judge refused so to rule and instructed the jury in substance that if the driver was instructed by the defendant not to take off the cover, or replace it, or clean out the rabbet, and did not do or attempt to do any of those things, but the servant of the owner of the premises did them under and pursuant to the owner's instructions, then the defendant would not be liable. We think that the instructions thus given were correct. The coal hole was not on the defendant's premises, and under the circumstances of the case it owed no duty to the plaintiff in respect thereto. If contrary to his instructions the driver had undertaken to remove

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the cover and replace it and had done so in a careless manner and the plaintiff had been injured in consequence thereof, the defendant would perhaps have been liable for the driver's negligence. But, in the absence of any custom or understanding in regard to the matter, there is no rule of law which requires a coal dealer to see that the coal cover on a customer's premises is replaced when the customer himself as owner or occupant of the premises undertakes in person or by his servant, in the exercise of his rights as such owner or occupant, to attend to the removal and replacement of the cover. Under such circumstances it is the owner's duty and not the coal dealer's to see that the cover is properly replaced and secured. The case would or might have stood differently if the driver had joined with the servant of the owner or occupant in replacing and securing the cover, or if the accident had happened while the coke was being delivered. *French* v. *Boston Coal Co.* 195 Mass. 334. *Wakefield* v. *Boston Coal Co.* 197 Mass. 527.

Exceptions overruled.

G. H. Mellen, (*J. B. Vallely* with him,) for the plaintiffs.

H. C. Sawyer, for the defendant, was not called upon.

COMMONWEALTH *vs.* ELIZABETH RICHMOND.

Middlesex, November 14, 1910. — January 3, 1911.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Pleading, Criminal, Indictment. *Homicide. Evidence,* Of motive, Presumptions and burden of proof. *Practice, Criminal,* Conduct of trial, Constitutional rights of defendant, Verdict. *Witness.*

The objection that an indictment for murder is defective, in that it is uncertain whether the assault and the murder are charged to have been committed upon one and the same person, because the word "said" does not precede the second mention of the name of the person alleged to have been murdered, even if there is anything in the point, only can be taken upon a motion to quash the indictment.

At the trial of an indictment for murder, although the Commonwealth is not required to show any motive for the commission of the crime, evidence tending to show such a motive always is competent.

At the trial of an indictment for murder, where robbery is suggested by the Commonwealth as a motive for the crime, the Commonwealth may show that shortly before the finding of the body of the deceased the defendant was pressed for money and that on the day the body was found the defendant had a "roll of

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bills," that the deceased had money in his possession immediately before his death, and that no money whatever was found upon his body when discovered after his death. There here was evidence of all these things.

At the trial of an indictment for murder, where there is evidence that shortly before the killing the defendant was pressed for money and after the killing had a roll of bills, that the deceased immediately before his death had money in his possession and that none was found upon his body, and where the Commonwealth has shown that the deceased was young, active and able-bodied and had been at work for many months in a State institution in a country town, without showing the amount of his compensation, if the district attorney says in his argument to the jury that the deceased had been working for $80 a month, when there is no evidence of it, but the argument is not interrupted and no ruling is requested upon the point and no exception is taken in regard to it, it will be assumed that the defendant was not harmed by the statement in the argument of the district attorney, and he cannot afterwards complain of it.

At the trial of an indictment for murder where it is material to show the fact that the defendant was in her rooms on the evening of a certain day, evidence that the defendant the next morning made a request of a witness which showed that she must have heard a threat made in a loud voice outside her door the evening before, which tends to show that the defendant was inside the door at that time, may be admitted, although the testimony of the witness as to hearing the threat made outside the defendant's door otherwise would be inadmissible, if in admitting the testimony the presiding judges carefully limit its effect to the purpose for which it is material.

If, at the trial of a criminal case, there are inconsistencies in the testimony introduced by the Commonwealth upon a certain issue, this affects only the weight of the evidence and does not make it incompetent if it is material to the issue upon which it was admitted.

At the trial of a criminal case, if the testimony of a witness introduced by the Commonwealth upon a certain issue tends to contradict the testimony of other witnesses called by the Commonwealth, although it was not introduced for that purpose, this does not make the evidence incompetent, if it was a statement by the witness of his observations by his senses and is material to the issue upon which it was admitted.

The provisions of R. L. c. 175, § 24, permitting a party who produces a witness to contradict him by other evidence, apply to a witness produced by the Commonwealth in the trial of an indictment for murder.

At the trial of an indictment for murder, certain evidence here was held to have been excluded properly as being indefinite and bearing no relation to any issue in the case, other evidence was held to have been excluded properly as not having been made material by necessary connecting evidence and also as being objectionable in form, and certain other evidence was held to have been admitted properly in the discretion of the presiding judges upon the redirect examination of a witness for the Commonwealth to explain a certain fact brought out upon his cross-examination.

At the trial of an indictment for murder a request of the defendant that a verdict of not guilty be ordered must be refused by the presiding judges if there is evidence, which, although wholly circumstantial, warrants a verdict of guilty under proper instructions in regard to the burden of proof.

At the trial of an indictment for murder it is not a sufficient reason for ordering a verdict of not guilty, that the jury might find that persons other than the defendant had an opportunity to commit the murder.

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At the trial of an indictment for murder it is not a sufficient reason for ordering a verdict of not guilty, that there are inconsistencies and contradictions in the testimony of witnesses, called by the Commonwealth, who at about the time of the murder were frequenting the house in which the murder was committed, because these matters affect only the weight of the evidence and are for the jury to pass upon.

At the trial of an indictment for murder it appeared that the murdered person was killed in a lodging and boarding house kept by the defendant, and that a number of persons were in the house during the period of time within which the murder was committed. All of these persons except the defendant were called by the Commonwealth as witnesses and each of them was asked the question whether he or she killed the murdered man and answered "No." In his argument to the jury the district attorney said, "Is there anybody in this case whose presence or absence is unaccounted for, except the one party charged with the crime? . . . Every person but one has told you under oath that they did not kill [the deceased]. This is significant." The defendant's counsel objected, and the presiding judge said, "That will be taken care of in the charge." The district attorney continued, "You have been told that the defendant is not to be prejudiced because she did not take the stand. . . . That is the last thing in the world I shall ask of you — to infer anything from the fact that she did not take the stand. And what I have just said has no relation to that except the bare fact that everybody but she has testified under oath that they did not kill [the murdered person]." The defendant's counsel objected. The district attorney continued, "If she has in her power or control any evidence which will explain where she was [on the night the murder was committed], if she has any friends that could come here and tell you where she was, and what she was doing, if she has any means whatever of putting before you any evidence showing where she was, and she fails to do it, we are entitled to call your attention to that failure, and you are entitled to use it as you see fit. . . . If she has within her possession or control any evidence to show that she is innocent; if she has such evidence that an innocent person would produce, I am entitled to call your attention to her failure to do so; and you are entitled to consider it in this case." The presiding judge in his charge to the jury instructed them that, although the defendant was permitted to testify in her own behalf, she was not obliged to do so, and that her failure to do so did not create any presumption against her and should not prejudice her in any way. He also gave accurate instructions as to the inferences which might be drawn from the defendant's failure to call other witnesses. At the close of the charge the defendant's counsel asked the presiding judge to instruct the jury that the district attorney had no right to make the argument above quoted. The judge refused to give such an instruction, and the jury returned a verdict of guilty. *Held*, that the argument of the district attorney that every person, so far as known, except the defendant, who had had an opportunity to do the killing had testified and, if such testimony was believed, did not commit the murder, leaving only the defendant unaccounted for, was a proper one, and that by the disclaimer of the district attorney of an intent to urge any inference from the defendant's failure to testify in her own behalf, coupled with the plain instruction in the charge of the judge, the constitutional rights of the defendant were amply protected.

In a criminal case, as in a civil one, unless there is something to show the contrary, it must be assumed that the jury understood and acted upon the instructions given to them by the judge.

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INDICTMENT, found and returned on September 4, 1909, charging the defendant with the murder of one Stewart MacTavish on July 23, 1909, in a house known as the Hotel Florence, at Cambridge, which was kept by the defendant as a boarding and lodging house.

In the Superior Court the defendant was tried before *Crosby* and *Dana*, JJ., and the charge to the jury was made by *Dana*, J. The jury returned a verdict of guilty of murder in the second degree; and the defendant alleged exceptions, raising the questions which are stated and considered in the opinion.

R. W. Gloag, for the defendant.

J. J. Higgins, District Attorney, for the Commonwealth.

RUGG, J. The defendant was indicted for murder.

1. The defendant filed no motion to quash the indictment. Hence the faint suggestion now made that it is defective, in that it is uncertain whether the assault and murder are charged to have been committed upon one and the same person, because "said" does not precede the second mention of the name of the person alleged to have been murdered, is not open to her. We do not intimate that there would be anything in the point even if seasonably presented. The indictment followed the form prescribed in R. L. c. 218, § 67. *Commonwealth* v. *Min Sing*, 202 Mass. 121, 132. *Commonwealth* v. *Jordan*, *post*, 259.

2. One motive suggested for the commission of the crime was robbery. A considerable amount of evidence was introduced by the Commonwealth tending to show that before the alleged homicide the defendant was heavily in debt and in need of ready money, and that immediately thereafter she had bills in her possession. When the evidence as to the financial embarrassment of the defendant was offered, although not objected to, the jurors were instructed in substance that it was admitted only as bearing upon the motive of the defendant in the commission of the offense charged, and that in order to be material for their final consideration, "certain other evidence must appear, and if that evidence does not appear, then this evidence which is now being admitted should be disregarded." No exception was taken, but at the close of the evidence the defendant asked for an instruction that this evidence should be disregarded. Subject to exception, this prayer was denied, and the instruction was given

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that although the Commonwealth was not required to show any motive for the commission of the crime, evidence tending to show such motive was always competent. After referring to evidence that "the prisoner was pressed for money shortly prior to the finding of the body of the deceased" and that on that day she "had a roll of bills," the judge further instructed the jurors that in order to consider the evidence at all they must be satisfied that the deceased had money in his possession immediately before his death, and thereafter the defendant had this money in her possession. These instructions were in accordance with well settled principles. *Commonwealth* v. *O'Neil*, 169 Mass. 394. *Commonwealth* v. *Williams*, 171 Mass. 461. *Commonwealth* v. *Devaney*, 182 Mass. 83. *Commonwealth* v. *Tucker*, 189 Mass. 457, 467. The chief argument urged is that there was no sufficient evidence that the deceased possessed any money shortly before his death. But this contention cannot be sustained. It might have been found that the murdered man was young, active, able-bodied, and had been at work for many months in a State institution in a country town. Although the amount of his compensation was not shown the jury might have used their general knowledge in drawing an inference in this respect. *Maynard* v. *Royal Worcester Corset Co.* 200 Mass. 1, 8. There was also evidence that he was in Cambridge for the purpose of attending the wedding of his sister, was on his way to spend a vacation in Prince Edward Island, whither he had checked his trunk and had bought a ticket, was a guest at a public house where he had given coin as a gratuity to a waiter, had manifested great care to keep near him a dress suit case, had said to a friend that he was sorry he had before asked him for money, that he had money "enough to see him through," and that no money whatever was found upon his remains. If these circumstances were found by the jury, the inference would have been warranted that the deceased had money to the amount of which the defendant was possessed after the homicide. It is argued also that there was error because the district attorney said in his argument to the jury that the deceased had been working for $30 per month when there was no evidence of it. But the argument was not interrupted, and no ruling was requested on this point, and no exception taken respecting it. Under these

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circumstances, it cannot be assumed that the defendant suffered any harm of which she can now complain.

3. The presence of the defendant in her bedroom or parlor, rooms which were connected, in the early evening of a certain day, was a material fact upon the trial. Against the exception of the defendant one Hannigan was permitted to testify that she overheard one Paige while standing near the bedroom door, and after the defendant had been called without any response, say, in a loud voice, in the course of talk with a servant of the defendant in which he demanded money or some satisfaction as to a disagreement about the hire of a room, "I shall bring an officer," and that next morning the defendant asked the witness not to let Paige bring an officer, and that "there was no need of any officer being brought about the room rent." There was no evidence that the defendant learned of this threat as to an officer in any other way than by being in the bedroom or parlor at the time it was uttered and thus hearing it. The evidence plainly had some tendency to prove that she was there. It was competent to this end, and was carefully limited by the judge to this purpose. If there were inconsistencies in some details of the testimony its weight only and not its competency was affected. It is also urged that this testimony tended to contradict that given by other witnesses called by the Commonwealth. It was not introduced for that purpose, but was the direct statement of the witness of the records of her own senses. Even if pointedly contradicting other evidence, it was still competent. R. L. c. 175, § 24.

4. One Clifford, a witness called by the Commonwealth, having testified at length concerning the people in the house where the deceased met his death, and their actions and some of their conversation, and that one Drohan had said in reply to his question a short time before the lifeless body of the deceased was discovered that MacTavish was in the house, was asked on cross-examination, "When was MacTavish again mentioned by any of you?" This question was properly excluded. It was indefinite as to persons, and appears to bear no relation to any issue in the case.

5. The chief inspector of police of Cambridge, who had been active in the investigation of the crime, was asked by the defendant

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whether after the defendant was indicted he had not "procured the putting of one of the government witnesses on probation after he had pleaded guilty to a crime." There was no error in the exclusion of this inquiry unsupported by any suggestion of inducement to a definite person. It was objectionable in form. The placing on probation of one charged with crime is the independent act of the court, and cannot be "procured" by anybody.

6. It was developed by the cross-examination of one Shannon, a police officer called by the Commonwealth, that certain men in the house of the defendant were placed under arrest on the day when the body of MacTavish was found. The arresting officer was permitted to testify on redirect examination, subject to the defendant's exception, that the purpose of putting them under arrest was to hold them for witnesses. This inquiry was permissible in the discretion of the judge for the purpose of refuting any inference that they were suspected of having committed the murder.

7. Other exceptions as to evidence were taken, which have not been argued, although it is stated that none of them are waived. They have all been examined with care, and no error appears to have been committed in respect of any of them. The statements made by the defendant to the officers after her arrest appear to have been made voluntarily after a caution, and were admissible. The instructions that they could not be considered unless made freely and without inducement were ample and correct. *Commonwealth* v. *Storti*, 177 Mass. 339. *Commonwealth* v. *Killion*, 194 Mass. 153.

8. At the close of the evidence the defendant requested that a verdict of not guilty be ordered. The evidence connecting the defendant with the commission of the crime was not from any eyewitness, but was made up of many different facts, which linked themselves together in a chain so strong as to convince the jury of her guilt under adequate instructions as to the degree of certainty to which their minds must be led before they could reach that result. Circumstantial evidence may be a thoroughly satisfactory basis for conviction of the highest crimes. Men commonly act in the most important concerns of life upon that kind of evidence. It is constantly applied in courts of justice, and has been commended by most eminent judges. *Com-*

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monwealth v. *Webster*, 5 Cush. 295, 310 *et seq.* *Commonwealth* v. *Williams*, 171 Mass. 461. *Perovich* v. *United States*, 205 U. S. 86, 91. It is not necessary to state in detail the circumstances which pointed to the guilt of this defendant. They were numerous, closely connected and might well have persuaded a jury. A minute analysis of the entire record shows that this prayer was properly refused. The chief argument urged in its support is that it might have been found that others had an opportunity, and that there were contradictions and inconsistencies in the testimony of witnesses called by the Commonwealth, who were frequenting the house at about the time the murder was committed. These considerations could only affect the weight of the evidence, and were proper for the jury to pass upon. They fall far short of impairing as matter of law the controlling inferences which might be drawn from all the circumstances.

9. Several other requests for instructions were presented. They have not been argued by the defendant and they do not require discussion one by one. It is enough to say that they were covered by the charge to the extent that they were sound in law and necessary to the decision of the case.

10. A number of people were in the house of the defendant during the period of time within which the decedent might have met his death. It was asserted that all of these persons had been called as witnesses. Commenting on this in the course of his argument, the district attorney used this language: "Is there anybody in this case whose presence or absence is unaccounted for, except the one party charged with the crime? My brother . . . urges upon you the utter futility of our putting these people on the stand and asking them the pregnant question, 'Did you kill Stewart MacTavish?' . . . He utterly failed to apprehend the significance of that question; for every person that was in that house that we could find — and he candidly and frankly says we have brought them all before you — every person but one has told you under oath that they did not kill Stewart MacTavish. This is significant." Objection was made to this argument by counsel for the defendant, and the judge stated, "That will be taken care of in the charge." Thereupon the district attorney proceeded: "You have been

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told that the defendant is not to be prejudiced because she did not take the stand. . . . That is the last thing in the world I shall ask of you — to infer anything from the fact that she did not take the stand. And what I have just said has no relation to that except the bare fact that everybody but she has testified under oath that they did not kill MacTavish." The defendant's counsel again addressed the court, asking that the argument be stopped. The district attorney proceeded: "If she has in her power or control any evidence which will explain where she was on Thursday night, if she has any friends that could come here and tell you where she was, and what she was doing, if she has any means whatever of putting before you any evidence showing where she was, and she fails to do it, we are entitled to call your attention to that failure, and you are entitled to use it as you see fit. . . . I am not asking you to infer anything from the fact that she did not take the stand. You have no right to do that. . . . But if she has within her possession or control any evidence to show that she is innocent; if she has such evidence that an innocent person would produce, I am entitled to call your attention to her failure to do so; and you are entitled to consider it in this case."

The jury were instructed in the charge that although the defendant was permitted to testify in her own behalf at her own request, she was not obliged to do so, and her failure to do so did not create any presumption against her and should not prejudice her in any way. Accurate instructions were given as to inferences which might be drawn from the defendant's failure to call other witnesses whose evidence might tend to exonerate her. At the close of the charge the defendant's counsel asked a specific ruling that the district attorney had no right to make the argument above quoted, but the court refused to give it.

Under the federal Constitution and that of this Commonwealth, no person can be compelled in a criminal case to be a witness or furnish evidence against himself. U. S. Const. Amendm. art. 5. Declaration of Rights, art. 12. R. L. c. 175, § 20, cl. 3, provides that a defendant in any "criminal proceeding shall, at his own request, but not otherwise, be allowed to testify; but his neglect or refusal to testify shall not create any presumption against him."

The fact that any defendant declines to avail himself of the

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privilege of testifying conferred by the statute, cannot be permitted to create any presumption against him. Courts guard sedulously the constitutional and statutory rights of defendants in this respect. Attempts to infringe upon the privilege of silence thus secured to persons charged with crime are carefully checked. *Commonwealth* v. *Harlow*, 110 Mass. 411. *Commonwealth* v. *Maloney*, 113 Mass. 211. *Commonwealth* v. *Costley*, 118 Mass. 1, 27. *Commonwealth* v. *Scott*, 123 Mass. 239. *Commonwealth* v. *Finnerty*, 148 Mass. 162. *Commonwealth* v. *Smith*, 163 Mass. 411, 433. *Commonwealth* v. *Johnson*, 175 Mass. 152. Two different courses of dealing with cases, where there has been any infraction of this rule, appear to be followed by the courts of the several States. Some hold that any reference to the subject in argument must be presumed to do irreparable harm to the defendant, and that there must be a new trial granted unless by conduct or consent there has been a waiver of the right. The industry of the counsel for the defendant has collected a large number of such cases, leading ones being cited in a footnote.* It will be found on examination that most of these decisions rest on a statute which in express terms forbids any comment or reference to the fact in argument by either counsel. Some courts, which have adopted this rule, seem to be breaking away from it and following one less stringent. *Blume* v. *State*, 154 Ind. 343, 354, and cases cited.

Other courts hold that, where such reference has been made and is either withdrawn or is corrected by the charge of the court, then it does not constitute reversible error.†

* *Austin* v. *People*, 102 Ill. 261. *State* v. *Balch*, 31 Kans. 465. *State* v. *Ryan*, 70 Iowa, 154. *Quinn* v. *People*, 123 Ill. 333, 346. *Hunt* v. *State*, 28 Tex. Cr. App. 149. *State* v. *Baldoser*, 88 Iowa, 55. *Yarbrough* v. *State*, 70 Miss. 593. *State* v. *Holmes*, 65 Minn. 280. *State* v. *Marceaux*, 50 La. 1137. *State* v. *Williams*, 11 So. Dak. 64. *Showalter* v. *State*, 84 Ind. 552. *State* v. *Payne*, 131 Mich. 474. *Jackson* v. *State*, 45 Fla. 38. *State* v. *Stoffels*, 89 Minn. 205. *State* v. *Snyder*, 182 Mo. 462, 523. *Barnard* v. *State*, 48 Tex. Cr. App. 111. *State* v. *Robinson*, 112 La. 939. *State* v. *Foley*, 24 Penn. Sup. Ct. 414. *Perkins* v. *Territory*, 17 Okla. 82. *Prince* v. *State*, 93 Miss. 263, 266.

† *Wilson* v. *United States*, 149 U. S. 60, 67. *People* v. *Hock*, 150 N. Y. 291, 304. *State* v. *Chisnel*, 36 W. Va. 659, 665. *Calkins* v. *State*, 18 Ohio St. 366. *State* v. *Buxton*, 79 Conn. 477. *O'Dell* v. *State*, 120 Ga. 152. *Minor* v. *State*, 120 Ga. 490. *Dunn* v. *State*, 118 Wis. 82. *People* v. *Hess*, 85 Mich. 128. *Petite* v. *State*, 8 Col. 518.

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It is the general rule in trials of both criminal and civil causes that where an improper argument is addressed to a jury the attention of the judge should be called to it at once. Unless it is a plain breach of propriety, the judge may in his discretion either direct the objectionable argument to end forthwith or permit it to proceed, but in any event the subject must be adequately covered in the charge with such emphasis as will correct any erroneous effect. *Commonwealth* v. *Worcester*, 141 Mass. 58. *Commonwealth* v. *Poisson*, 157 Mass. 510, 513. *Commonwealth* v. *Peoples Express Co.* 201 Mass. 564, 580. *Commonwealth* v. *Coughlin*, 182 Mass. 558, 563. *Sayles* v. *Quinn*, 196 Mass. 492. *O'Driscoll* v. *Lynn & Boston Railroad*, 180 Mass. 187, 190. No sound reason appears why this rule of practice should not apply to unwarranted arguments by a district attorney, even in respect of a failure by a defendant to take the stand in his own behalf. It is a matter of common knowledge that defendants may testify if they desire. Where they do not take advantage of this privilege, frequently counsel for defendants refer to the statute and to the constitutional provisions, in order to explain conduct which might otherwise seem strange to the jurors. While this does not open the door to the district attorney to reply, it shows that the subject itself is one which does not have an inherent tendency to harm a defendant. The fact that a defendant has not testified cannot be banished from the observation of the jury, and it is proper that his counsel may suggest the reason for it. It is always the duty of the judge to state the law touching the matter.

The argument of the district attorney inferentially called attention to the fact that the defendant had not testified; but it was a pertinent proposition for him to discuss that every person, so far as known, save her, who had been in such relation to the premises where the remains of the murdered man were found as to have had opportunity to commit the crime, had testified. This was germane not for purpose of creating a presumption against the defendant by reason of her failure to testify, but to the end that the jury might consider the circumstance that everybody else, who could have done the deed, was accounted for, if the testimony was believed. The immediate disclaimer of the district attorney of intent to urge any infer-

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ences from her failure to testify, coupled with the plain instruction of the judge in the charge in accordance with the statute and decisions abundantly protected the rights of the defendant. It must be assumed that the jury understood and acted upon the directions given by the judge. *Commonwealth* v. *Cunningham*, 104 Mass. 545.

Exceptions overruled.

COMMONWEALTH *vs.* GUISEPPE DE VICO.

Suffolk. November 14, 1910. — January 3, 1911.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Evidence, Relevancy, Opinion, Of disposition. *Assault and Battery*, Self defense.

At the trial of an indictment for assaulting and beating a certain person with a dangerous weapon, where the defendant contends and introduces evidence tending to show that he struck the assaulted person in self defense, it is proper to exclude, as not being competent upon the issue as to whether the defendant acted in self defense, the following questions asked of the defendant's employer, "Is the defendant a man that becomes excited quickly?" "Is the defendant a man of excitable disposition?"

While the defendant in a criminal case may introduce evidence regarding his good character as tending to show the improbability of his having committed the crime with which he is charged, such evidence must be limited to his general reputation in regard to the elements of character involved in the commission of the alleged offense, and the private opinion of a witness in regard to the matter is irrelevant and immaterial. Therefore, at the trial of an indictment for assaulting and beating a certain person with a dangerous weapon, it is proper to exclude the following question, asked of the defendant's employer, who was called by the defendant, "Is the defendant a man of a quarrelsome nature?"

INDICTMENT, found and returned on July 9, 1910, for assaulting and beating one John P. Nagle with a dangerous weapon.

In the Superior Court the case was tried before *De Courcy*, J. The evidence for the Commonwealth tended to show that on June 25, 1910, at about 10 P. M., Nagle with one Sachs and one Bigney were proceeding across the Common in Boston, when their attention was attracted by loud talk between two Italians, one of whom was the defendant. They stopped to listen, when the defendant turned around from the man with whom he was talking and said to Nagle, "What do you want? Go along and mind your business; some of you fellows will get hurt." Nagle replied, "We have just as much right to stand here as you have,"

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and at that moment the man with whom the defendant was talking stabbed the defendant in the back and ran away. Thereupon the defendant took from his pocket a knife and stabbed Nagle in the arm.

The defendant's evidence tended to show that, while he was sitting on the Common with another friend and two women, Nagle, Bigney and Sachs stepped up to them, with one Crowley, and one of them removed the hat from the head of one of the women, whereupon the defendant told them to mind their own business. Then Bigney took hold of the lapel of the defendant's coat and lifted him from the settee, while the other three were standing around him, Crowley striking him in the face and Sachs putting his hand into his pocket, while Nagle stabbed him in the back. Thereupon the defendant drew from his pocket a knife and stabbed Nagle in the arm.

The questions asked of the defendant's employer, to the exclusion of which the defendant's exceptions relate, are stated in the opinion.

The presiding judge asked the jury to make a special finding in answer to the question, whether or not the wound in the defendant's back was caused by Nagle. The jury answered the question, "No," and found the defendant guilty. The defendant alleged exceptions.

The case was submitted on briefs.

E. M. Shanley, for the defendant.

M. J. Dwyer, Assistant District Attorney, for the Commonwealth.

MORTON, J. The defendant was indicted for an assault with a dangerous weapon. There was a verdict of guilty and the case is here on the defendant's exceptions to the exclusion by the presiding judge of the following questions: "Is he [meaning the defendant] a man that becomes excited quickly?" "Is he a man of excitable disposition?" and "Is he a man of a quarrelsome nature?" The witness, who was the defendant's employer and who was called by him, was asked by the defendant what his, the defendant's, general reputation for peacefulness was and answered, "I know him in the shop. I live out of town and he lives in the city." He was then permitted to testify without objection that the defendant worked every day from seven in

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the morning to a quarter past six at night and that he never saw him drink. He was then asked without objection, "Is he a quarrelsome man," and he answered "Not in my place." The defense was that the defendant acted in self defense. He so testified in effect. But manifestly the fact that he was of an excitable disposition had no tendency to show that he acted in self defense. The most that it would tend to show would be that he might have acted more hastily and have been more easily provoked than would have been the case with a man of cooler temperament. But that would have had no tendency to show that he was acting in self defense. If the offer had been to show that his alleged assailant had the reputation of being a quarrelsome man, the evidence would have been admissible. *Commonwealth* v. *Tircinski*, 189 Mass. 257. But what the defendant offered to show was that he himself was of an excitable disposition, which as we have said had nothing to do with the question whether he acted in self defense.

As to the question whether he was a man of a quarrelsome nature it perhaps would be enough to say that the same question, with a trifling variation in form, had been previously put and answered without objection, and the question to the exclusion of which exception was taken might well have been ruled out for that reason. But we prefer to rest our decision on the broader ground that while the defendant in a criminal case may put in his good character as tending to show the improbability of his having committed the crime with which he is charged, the evidence must be limited to his general reputation in regard to the elements of character involved in the commission of the alleged offense. *Commonwealth* v. *Nagle*, 157 Mass. 554. *Day* v. *Ross*, 154 Mass. 13. *Commonwealth* v. *Maddocks*, 207 Mass. 152. *State* v. *Roderick*, 14 L. R. A. (N. S.) 704 n. *State* v. *Hull*, 20 L. R. A. 609 n. The private opinion of a witness in regard to the matter is irrevelant and immaterial. The defendant was allowed to show what his general reputation for peacefulness was; but apparently he either was not satisfied with that or with the answer, and desired to have the witness go further and state, in substance and effect, what conclusion he had himself come to or what opinion he had formed in regard to the defendant's disposition. This he could not do. *Exceptions overruled.*

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GILMAN W. BROWN *vs.* ANNA W. BROWN.

Essex. November 15, 1910. — January 3, 1911.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Marriage and Divorce, Decree *nisi*, General order. *Rules of Court. Statute*, Construction.

R. L. c. 152, § 18, is as follows: "Decrees of divorce shall in the first instance be decrees *nisi*, and shall become absolute after the expiration of six months from the entry thereof, unless the court before the expiration of said period, for sufficient cause, upon application of any party interested, otherwise orders." Divorce Rule 6 is as follows: "At any time before the expiration of six months from the granting of a decree of divorce *nisi*, the libellee, or any other party interested, may file in the office of the clerk for the county in which the libel is pending, a statement of objections to an absolute decree, which shall set forth specifically the facts on which it is founded, and be verified by affidavit. Such decree shall not become absolute until such objections have been disposed of by the court." *Held*, that this rule of court is not in conflict with the statute, but on the contrary is an order made under the statute by all the judges of the Superior Court in adopting the rule, and that there is nothing in the statute which requires a special order in each case rather than a general order applicable to all cases of a certain class. Therefore, where a decree *nisi* has been made and objections to an absolute decree are filed under the rule before the expiration of six months from the granting of the decree *nisi*, such decree does not become absolute under the statute at the expiration of the six months.

KNOWLTON, C. J. On September 16, 1904, the libellant in this case obtained a decree of divorce *nisi* on account of adultery of the libellee. On February 18, 1905, the libellee filed objections to an absolute decree, properly supported by an affidavit averring condonation of the adultery by the libellant since the entry of the decree *nisi*, by his cohabitation with the libellee on numerous occasions. On January 1, 1907, the libel was dismissed.* The case comes before us upon exceptions, and upon an appeal from an order † denying a motion, made long afterwards, for the entry of a decree absolute. We need not consider the other libels that have been brought by the libellant at different times since the entry of the first decree, nor the other motions and orders that have been made in the case. The fundamental

* By *DeCourcy*, J. A later order of "Libel dismissed" was made by *Lawton*, J., on March 25, 1909.

† Made by *Bell*, J.

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question is whether, by force of the statute, the decree *nisi* became absolute at the expiration of six months, notwithstanding the filing of objections by the libellee.

The R. L. c. 152, § 18, is as follows: "Decrees of divorce shall in the first instance be decrees *nisi*, and shall become absolute after the expiration of six months from the entry thereof, unless the court before the expiration of said period, for sufficient cause, upon application of any party interested, otherwise orders." After the enactment of this statute the Superior Court adopted Divorce Rule 6, which is in these words: "At any time before the expiration of six months from the granting of a decree of divorce *nisi*, the libellee, or any other party interested, may file in the office of the clerk for the county in which the libel is pending, a statement of objections to an absolute decree, which shall set forth specifically the facts on which it is founded, and be verified by affidavit. Such decree shall not become absolute until such objections have been disposed of by the court." The action of the Superior Court in this case was in accordance with the rule.

The question is whether the rule is in conflict with the statute. By the application of this rule, was there an order of the Superior Court, properly applicable to the case, which prevented the decree from becoming absolute after the expiration of six months from the entry thereof?

The rule in terms covers the case. It was intended to cover such cases. We have not only the action of three judges of the Superior Court in the present suit in accordance with it, each acting independently when the case came before him, but we have the original joint action of all the judges of that court establishing the rule, which creates a very strong presumption in favor of its validity. It first prescribes a possible method of practice for making the application referred to in the statute. This may be by a statement of objections, setting forth specifically the facts on which it is founded, verified by affidavit. This does not deprive a party of his right to make an application for an order in any other proper way, under the statute. It is in the nature of a general order, applicable to all cases in which such a statement is made, that the statement shall be a sufficient cause for a hearing before the decree shall become absolute. It is a gen-

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eral order, applicable to all such cases, that the decree shall not become absolute until after a hearing and disposition of the objections. Every element that enters into the rule is in exact accordance with the spirit and purpose of the statute. Its effect is perfectly to carry out the intention of the Legislature. A general order that in every case such a statement shall be a sufficient cause for a hearing, and for postponing the absolute effect of the decree until after the hearing, is unobjectionable. There is no occasion for a special hearing upon that subject and a special order to that effect in each case, as distinguished from a general order covering all such cases. This being so, there is no reason for a special order in each case that the decree shall not become absolute until the objections are disposed of, as distinguished from a general order of that purport, applicable to all such cases.

It remains to inquire whether there is any formal or technical requirement that an order under this statute shall be a special order for each case, rather than a general order applicable to all cases of a certain class. We know of none. A general order applicable to cases of this class meets the language and object of the statute, as well as a special order.

The decree *nisi* did not become absolute by lapse of time after the statement of objections was filed.

Exceptions overruled; order affirmed.

The case was submitted on briefs.

W. S. Peters, H. J. Cole & F. H. Tilton, for the libellant.

H. Parker & R. Walcott, for the libellee.

HELEN F. HORAN, petitioner.

Suffolk. November 15, 1910. — January 8, 1911.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Practice, Civil, Exceptions.

The judge of a trial court is right in refusing to allow a bill of exceptions which contains an erroneous statement, probably unintentional, that a certain exception was taken that was not taken, which contains a long report of evidence wholly unnecessary to a proper presentation of the legal questions raised and there-

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fore irrelevant and objectionable, and which presents a picture of the case changed in color by the strong feeling of the excepting counsel in favor of his client.

The insertion in a bill of exceptions, alleged to have been taken at the trial of a libel for divorce, of a statement of testimony, which is irrelevant to the questions of law raised in the case, for the purpose of affecting the sympathies or feelings of the justices of this court and inclining them to a revision of the findings of fact made at the trial, is not legitimate.

The proof of a bill of exceptions before this court through the appointment of a commissioner is a remedy that sometimes may be necessary, but it is intended only for cases in which the excepting party, intelligently and in good faith but unsuccessfully, has attempted to obtain the allowance of a bill of exceptions which in general is a correct statement of the material questions raised by his exceptions made with due regard to the rights of the opposing party.

KNOWLTON, C. J. This is a petition to prove a bill of exceptions which was disallowed as not conformable to the truth. It appears by the commissioner's report that there was but one exception taken at the trial, and that another was afterwards taken to the consideration of certain evidence by the judge, which consideration he disclosed by his memorandum of his findings. Besides these two exceptions, the bill, as filed, set forth another as having been taken at the trial. In his certificate of disallowance the judge * said: "The bill does not make a truthful statement of the case, as the narrative throughout is distorted by the view which the counsel takes of the proper interpretation of the evidence. The only exception claimed at the trial relates to the exclusion of certain testimony of witnesses as to the reputation for truth and veracity and for chastity of the libellee Mrs. Horan. No extended statement of the evidence, in my judgment, is necessary to a truthful statement of this exception. Counsel for the libellee, however, desire to insert the substance of all the testimony offered in the case." The bill of exceptions is very long and the evidence is voluminous, the trial having occupied five days. There is no reason why everything necessary to present properly the question of law involved in the exception to the exclusion of a certain class of testimony, relating to the reputation of a witness, could not have been stated very briefly. The same is true of the facts bearing upon the other exception relative to the consideration by the judge of a certain writing, material to the issue, which was discovered upon

* *Wait, J.*

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blotting paper, bound in as one of the interleaves in a hotel register that was put in evidence and taken away by the judge for examination at the close of the trial, he having heard the case under our practice, without a jury. This writing had not been discovered by counsel in their examination of the book.

The commissioner has indicated, by erasures and insertions throughout the evidence, what should be admitted and what added to make the report of the testimony an impartial statement of that which was presented at the trial. The report shows that the bill, as filed, was colored by the zeal of counsel to present the case in a form as favorable as possible to his client. The judge was plainly right in disallowing this bill of exceptions. In the first place, probably by an unintentional error on the part of the libellee's counsel, it stated that an exception was taken that was not taken. Next it contained a long report of evidence which was wholly unnecessary to a proper presentation of the legal questions raised, and was therefore irrelevant and objectionable. Such a statement of testimony, if made with a view to affect the court, through the sympathies or feelings of the justices, and to incline them to a revision of the findings of fact made at the trial, is not for a legitimate purpose. Thirdly, the picture of the case that it presented was changed in color, probably without deliberate purpose, by the strong feeling of the advocate for the client whom he represented.

It is the duty of counsel to present a bill of exceptions in such a form that the judge may properly allow it without injustice to the opposing party. If, through misunderstanding or mistake, a bill of exceptions needs amendment, as will often happen, it ought to be put in proper form, so that it can be allowed by the judge without jeopardizing the rights of any party. Proof of a bill of exceptions before this court through the appointment of a commissioner is a remedy that sometimes may be necessary; but it is intended only for cases in which the excepting party has attempted, intelligently and in good faith, but unsuccessfully, to obtain the allowance of a bill of exceptions which, in general, is a correct statement of the material questions, made with due regard to the rights of the opposing party. While this court has sometimes dealt liberally with parties who have made slight

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unintentional errors, when afterwards they have asked to prove a bill of exceptions, it is important that the rights of parties having a verdict or finding in their favor should be protected, so that they may be saved unnecessary litigation and expense.

In the present case we are of opinion that the bill of exceptions presented to the judge was not conformable to the truth, within the meaning of the statute. It follows that it was rightly disallowed, and that the petition before us must be dismissed.

We reach this result with less regret than we should feel in a case where it was apparent upon the record, as it is not here, that there had been an error of law at the trial, and that a party would suffer from a wrong decision.

Petition dismissed.

L. M. Friedman, for the petitioner.

J. E. McConnell, for the respondent.

COMMONWEALTH *vs.* CHESTER S. JORDAN.

Middlesex. November 17, 18, 1910. — January 3, 1911.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Homicide. Pleading, Criminal, Indictment. *Practice, Criminal*, Motion for disclosure of evidence of Commonwealth, Jurors, New trial. *Constitutional Law. Jury and Jurors. Superior Court*, Jurisdiction. *Evidence*, Competence, Medical books, Opinion: experts, Presumptions and burden of proof.

Upon the return of an indictment for murder and before the defendant had pleaded to it, he made a motion that the district attorney be ordered to furnish him with a copy of the report of an autopsy of the deceased which had been made by a medical examiner, with a copy of an alleged confession by the defendant to certain police officers, with the names of all witnesses summoned before the grand jury when the indictment was found, with a transcript of the evidence upon which the grand jury found the indictment, and also that the district attorney be ordered to furnish to certain physicians designated by the defendant portions of the body of the deceased taken at the time of the autopsy by the medical examiner. Before the hearing of the motion, the district attorney furnished the defendant with a list of the witnesses who were before the grand jury. A judge of the Superior Court denied the motion as to all other things asked for by the defendant. *Held*, that the motion was in no just or proper sense a motion for a bill of particulars, and that its denial was within the discretion of the judge; and, *also*, even if it be assumed that the action of the judge was reviewable by this court, there was nothing to call for revision.

While one indicted for murder is entitled, upon making a proper motion therefor, to any information in the possession of the Commonwealth which is necessary

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to enable him to understand the nature of the crime with which he is charged and to prepare his defense, there is no rule of law which requires the Commonwealth to disclose to the defendant, on a motion made before the defendant has pleaded, the evidence on which it relies for the proof of the allegations of the indictment, and the defendant has no right to ask for such disclosure.

The statute prescribing, among other forms, a form for an indictment for murder, R. L. c. 218, is not an infringement of article 5 or of article 14 of the Amendments to the Constitution of the United States, or of article 12 of the Massachusetts Declaration of Rights, providing that "no subject shall be held to answer for any cause or offence, until the same is fully and plainly, substantially and formally, described to him," because the statutory form states all that is necessary to enable the accused fully to understand the offense charged and, if, in order to prepare his defense, the accused should require a more particular description of the manner in which and the means by which the alleged crime was committed, and for that reason the indictment may not be regarded as describing the crime "fully and plainly, substantially and formally," his constitutional rights are fully protected by the provisions of R. L. c. 218, § 39, which give him an absolute right to such particulars as it may be necessary for him to have in order to prepare his defense.

The Superior Court is not deprived of jurisdiction of an indictment for a murder returned by a grand jury chosen from lists prepared after St. 1907, c. 348, amending R. L. c. 176, with regard to the methods of choosing jurors, went into effect, by the mere fact that the list of persons qualified to act as jurors, which was prepared by the selectmen of one of the towns in the county, was submitted to and accepted by the voters of the town at a town meeting, which had been necessary under the provisions of R. L. c. 176, § 5, but was rendered unnecessary by the amendment contained in St. 1907, c. 348, § 5.

The provisions of R. L. c. 176, § 5, as amended by St. 1907, c. 348, § 5, requiring delivery to the clerk of the city or town to which the list of persons eligible for jury duty, prepared in accordance with R. L. c. 176, § 4, as amended by St. 1907, c. 348, § 1, relates, and to the clerks and assistant clerks of the Supreme Judicial and Superior Courts in the county in which such city or town is situated, are directory and not mandatory, and such requirements are incidental rather than fundamental; and therefore the Superior Court is not deprived of jurisdiction of an indictment for murder by the mere fact that some members of the grand jury which returned the indictment were chosen in towns where such requirements were not complied with and from names on lists, copies of which were not furnished to the various clerks of towns and of courts as specified in the statute, if the jurors themselves were personally qualified to serve.

The Superior Court is not deprived of jurisdiction of an indictment for murder by the mere fact that one member of the grand jury which returned the indictment, personally fitted to serve thereon, after he was chosen as a juror and before the return of the indictment, had removed from and ceased to be an inhabitant of the town from which he was drawn and had become an inhabitant of another town in the same county, because such removal in itself did not disqualify him from acting as a member of the grand jury.

The mere fact that a printed copy of the list of persons qualified to act as jurors, prepared by the selectmen of a town in accordance with R. L. c. 176, § 4, as amended by St. 1907, c. 348, § 1, was not furnished to the clerk of the town and to the clerks and assistant clerks of the Superior and Supreme Judicial Courts in the county in which the town was situated, as required by R. L. c. 176, § 5, as amended by St. 1907, c. 348, § 5, does not give the defendant in an indictment

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for murder a right to challenge for cause a person duly drawn from such list and personally qualified to serve as a traverse juror in the trial of the indictment.

Doubt, expressed by MORTON, J., as to whether it can be said that a defendant in an indictment for murder would not be harmed by being refused the right to challenge for cause a person improperly called to serve as a juror, where, upon such refusal, he exercises his right of peremptory challenge and in the impaneling of the jury does not exhaust the twenty-two peremptory challenges which he is allowed by R. L. c. 176, § 29.

Medical books are not admissible in evidence at a trial for the purpose of showing the views entertained by their authors in regard to matters in issue at the trial.

Where, at the trial of an indictment for murder, there is a question whether a certain cut on the neck of the deceased was made before or after death, the defendant contending that it was made after death and, for the proof of that contention, relying on evidence that it was of a nature described as "inverted," it is not proper in cross-examination of a medical expert called by the Commonwealth for counsel for the defendant, holding in his hand a book from which he apparently was framing the question, to ask the witness, "If Professor B. [who was not a witness in the case or in any way connected with it] . . . said that the inverted edge was evidence of a cut after death would that change the opinion which you now express that the . . . [cut] . . . may be *ante mortem?*", because an answer to the question would place before the jury in an indirect manner the opinion of Professor B.

At the trial of a criminal case, where there is evidence which tends to prove the facts as assumed in a hypothetical question put by the Commonwealth in cross-examination to an expert witness called by the defendant, the question, if relevant, is admissible, it being for the jury to say whether the evidence proved the facts as assumed.

At the trial of an indictment for murder, where the Commonwealth contended that there was evidence of killing by asphyxiation or strangulation and by blows on the head, and also that there was evidence that the victim's throat was cut during life, the Commonwealth is not obliged to show that the death of the victim was due to any one particular cause, but, if the jury are satisfied beyond a reasonable doubt that death was caused by a combination of injuries inflicted by the defendant, notwithstanding they are unable to determine the exact way in which the victim was killed, a verdict of guilty is warranted.

At the hearing of a motion by the defendant for a new trial of an indictment for murder, based upon a contention that one of the jurors at the time of the trial of the case was insane, the rules relating to criminal practice and procedure do not apply, and the burden is upon the defendant of proving the insanity of the juror and of sustaining by a fair preponderance of evidence the contentions which are the basis of the motion; and, upon exceptions by the defendant to a finding by the judges, who heard the motion, that the juror was not insane, and to a denial of the motion, the question before this court is not as to the weight of the evidence, but only whether there was any evidence to support the finding.

INDICTMENT for murder, as follows:

"At the Superior Court, begun and holden at Lowell within and for the County of Middlesex, on the first Monday of March in the year of our Lord one thousand nine hundred and nine.

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"The Jurors for the Commonwealth of Massachusetts on their oath present, that Chester S. Jordan on the first day of September in the year of our Lord one thousand nine hundred and eight at Somerville, in the County of Middlesex aforesaid, did assault and beat Honora C. Jordan with intent to murder her, and by such assault and beating, did kill and murder the said Honora C. Jordan.

"Against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided."

The proceedings before trial are stated in the opinion. The motion for disclosure of evidence of the Commonwealth was heard and denied by *Aiken*, C. J. The demurrer to the plea to the jurisdiction was heard and sustained by *Stevens* and *Bell*, JJ.

The trial was before *Stevens* and *Bell*, JJ. The deceased was the wife of the defendant. There was evidence for the Commonwealth tending to show that the defendant and his wife had quarrelled in the evening of September 1, 1908, that he had struck her with the sharp corner of a flatiron, and that she had fallen to the floor; that subsequently he had severed her head from her body, had dismembered the body, placing parts of it in a trunk, burning other parts and placing others in the furnace of the apartment where he lived; that he had caused an expressman to take the trunk to the South Station in Boston, and later caused a hackman to take the trunk and himself to the Metropolitan steamship docks, stating that he intended to take a boat for New York; that upon reaching the dock he had changed his instruction to the hackman and had caused himself with the trunk to be driven to a room which he had hired on Hancock Street. There he was visited by policemen, to whom before opening the trunk he told conflicting stories accounting for its presence and contents, and who, upon the trunk being opened, discovered under various articles of woman's apparel parts of the body of the deceased. Later, at the police station, without any show of emotion, the defendant made a confession in which he stated that, after some quarrelling, his wife approached him with a carving knife as though to strike him and he struck her, knocking her down stairs, that thereafter his mind was a blank for over a day, and that then he dismembered and disposed of the body as above stated.

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The chief defense at the trial was insanity.

Other facts are stated in the opinion.

The requests of the defendant for rulings, described in the opinion, were as follows:

"15. If the jury are left in reasonable doubt as to whether the throat was cut in life or within thirty minutes after death, then upon all the evidence in the case all the incised cuts upon the body including the throat cut itself are to be eliminated from the case in reaching their conclusions.

"16. There is no sufficient evidence in the case to warrant the jury in finding beyond a reasonable doubt that the throat of the deceased was cut during life.

"17. In the case at bar it is not proved beyond a reasonable doubt that the throat of the deceased was cut during life

"18. Upon all the evidence in the case it is not established beyond a reasonable doubt that any of the incised cuts upon the body of the deceased were made before death.

"19. Upon all the evidence in the case it is not proved beyond a reasonable doubt that the blows upon the head were the cause of the death of the deceased.

"20. Upon all the evidence in the case it is not proved beyond a reasonable doubt that the deceased came to her death through strangulation or asphyxiation.

"21. Upon all the evidence in the case it is not proved beyond a reasonable doubt that the deceased came to her death by cutting of the throat, blows upon the head, strangulation or asphyxiation or by the combination of any or all of these.

"22. It is not proved beyond a reasonable doubt upon all the evidence in the case how the deceased came to her death.

"23. It is not proved beyond a reasonable doubt upon all the evidence in the case how the deceased came to her death, and as a matter of law the jury for this reason cannot return a verdict of murder in the first degree."

"36. If the jury find that the deceased came to her death through choking by the defendant, that fact alone is not sufficient to warrant the jury in returning a verdict of guilty of murder in the first degree."

The jury found the defendant guilty of murder in the first degree; and the defendant alleged exceptions.

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H. H. Pratt & A. T. Smith, (*C. W. Bartlett & J. S. Sullivan* with them,) for the defendant.

J. J. Higgins, District Attorney, for the Commonwealth.

MORTON, J. This was an indictment for the murder by the defendant of one Honora C. Jordan, who was his wife. There was a verdict of guilty of murder in the first degree, and the case is here on the defendant's exceptions and on his appeal from an order sustaining a demurrer to a plea to the jurisdiction. There are two bills of exceptions, the first relating to matters arising at and during the trial and prior thereto, and the other to matters arising at the hearing on the motion for a new trial.

We take up first the first bill of exceptions, and shall consider the various exceptions so far as practicable in the order in which they were taken.

Upon the return of the indictment and before the defendant had pleaded to it he made a motion that the district attorney be ordered to furnish him with a copy of the autopsy made by Thomas M. Durell, M.D., the medical examiner, and of the alleged confession by the defendant to the police officers of Boston; also that he be ordered to furnish the defendant's attorneys with the names of all of the witnesses summoned before the grand jury when the indictment was found, and with a transcript of the evidence upon which the grand jury found the indictment, and to afford them an opportunity to inspect all weapons and other exhibits and things in the possession of the district attorney; and lastly, that the district attorney be ordered to furnish to certain physicians designated by the defendant portions of the body taken at the time of the autopsy by the medical examiner. Before the hearing upon the motion the district attorney in accordance with the practice which prevails here (*Commonwealth* v. *Edwards*, 4 Gray, 1; see also R. L. c. 218, § 9), furnished the defendant with a list of the witnesses before the grand jury but declined to do any of the other things specified in the motion. The motion was heard by *Aiken*, C. J., and was denied except as to the list of witnesses before the grand jury which the district attorney had already furnished to the defendant. As to that it was granted. The defendant excepted to the refusal to allow the motion in respect to the other particulars specified. As to those matters it is plain, we think,

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that it was within the discretion of the judge to grant or refuse the motion. The motion was not in any just or proper sense a motion for a bill of particulars, but was rather an attempt (we do not use the word "attempt" in any invidious sense) to compel the Commonwealth to disclose, in part at least, the evidence on which it relied. There is no rule of law which requires the Commonwealth to do that, or which gives a defendant the right to ask it. So far as the information specified, or any other information in the possession of the Commonwealth, was necessary in order to enable the defendant to understand the nature of the crime with which he was charged and to prepare his defense, he was entitled to have it furnished to him in the shape of a bill of particulars, upon a proper motion to that effect. But as we have said, this was not such a motion. The office of a bill of particulars is not to compel the Commonwealth to disclose its evidence, but to give the defendant such information in addition to that contained in the complaint or indictment in regard to the crime with which he is charged, as law and justice require that he should have in order to safeguard his constitutional rights and to enable him fully to understand the crime with which he is charged and to prepare his defense. Undue stress should not be laid upon the form of the motion, but it should at least appear that without the information which is desired justice will not or may not be done. See *Commonwealth* v. *Snelling*, 15 Pick. 321. There is no statutory provision requiring the district attorney to furnish the defendant with a copy of the report of the autopsy, though of course he can do so if he sees fit. See R. L. c. 24, § 10. In the present case, even if we assume in favor of the defendant without so deciding, that we have power to revise the action of the Superior Court, we discover nothing that should lead us to do so. This exception must therefore be overruled. It should be added that, although the exception was to a ruling by the Chief Justice, it seems to have been incorporated without objection into the bill of exceptions allowed by the Justices who presided at the trial, and we have dealt with it accordingly.

At the same time that the defendant filed the motion which we have been considering, he also filed a motion to quash the indictment on the ground that the alleged offense was not fully,

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plainly, formally and substantially described, or described in such a manner as to apprise the defendant of the exact nature and cause of the offense intended to be charged, or to enable him to avail himself of his conviction or acquittal in a further prosecution for the same crime; or to inform the court of the facts alleged so that it could decide whether they were sufficient to support a verdict if one was rendered against the defendant; and also on the ground that R. L. c. 218, under which the indictment was drawn, was unconstitutional and void under article 12 of the Massachusetts Declaration of Rights and articles 5 and 14 of the Amendments to the Constitution of the United States. The motion to quash was overruled and the defendant excepted. The indictment is in the form prescribed for murder in the "Schedule of Forms of Pleadings" annexed to R. L. c. 218. There is no count at common law, and that is said by the defendant to distinguish this case from other cases of indictment for murder in which similar questions as to the constitutionality of the statute have been raised. It is true, as the defendant contends, that in previous cases of murder there has been a count at common law added to the count under the statute; but nevertheless we think that the question as to the constitutionality of the statute must be regarded as having been settled in the affirmative by previous decisions in a variety of cases and, it seems to us, rightly so. *Commonwealth* v. *McDonald*, 187 Mass. 581, 585. *Commonwealth* v. *Snell*, 189 Mass. 12. *Commonwealth* v. *Sinclair*, 195 Mass. 100. *Commonwealth* v. *Bailey*, 199 Mass. 585. *Commonwealth* v. *King*, 202 Mass. 379, 384. In *Commonwealth* v. *Storti*, 177 Mass. 339, the court expressly declined to give any countenance to the suggestion that the statute was unconstitutional. The purpose of the constitutional provisions relied on is to secure to the accused such a description of the offense with which he is charged as will enable him fully to understand it and to prepare his defense. *Commonwealth* v. *Robertson*, 162 Mass. 90. So far as enabling a defendant to understand the offense with which he is charged is concerned, there can be no just ground of objection to the statutory form of indictment. If A. is charged in an indictment with having at a certain time and a certain place which are specified assaulted and beaten B. with the intent to murder him,

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and with having by such assault and beating killed and murdered the said B., A. cannot fail to understand from the indictment itself that the crime with which he is charged is the murder of B. at the time and place specified. Allegations as to how he killed B. would not help him to understand any better the crime with which he is charged than, as was said in substance by Wells, J., in *Commonwealth* v. *Woodward*, 102 Mass. 155, 160, a particular description of the wound would help the defendant to understand for what injury he was called upon to answer. No question could arise as to the sufficiency of the facts alleged to support a conviction, or to embarrass the defendant if he should have occasion to file a plea of former conviction or acquittal. If the defendant should require a more particular description of the manner in which and the means by which the alleged crime was committed in order to enable him to prepare his defense, and the indictment could not for that reason be regarded as describing the crime charged "fully and plainly, substantially and formally," the statute (R. L. c. 218, § 39) gives him an absolute right to such particulars as it may be necessary for him to have in order to prepare his defense, and his constitutional rights are thus fully protected. *Commonwealth* v. *Snell*, *supra*. *Commonwealth* v. *McDonald*, *supra*. *Commonwealth* v. *Sinclair*, *supra*. *Commonwealth* v. *Bailey*, *supra*. *Commonwealth* v. *King*, *supra*. The means by which a murder is committed do not constitute an essential part of the crime and therefore need not be alleged in the indictment under R. L. c. 218, § 21. It is no doubt true, as contended by the defendant, that allegations as to the means by which and the manner in which the homicide was effected were formerly regarded as essential to the validity of an indictment for murder. But the object of the statute is to simplify criminal pleading, and the question before us is, whether, in its efforts to do so, the Legislature has gone so far as to infringe upon the constitutional rights of the accused. For reasons given above we do not think that it has. It follows from the construction and effect which we have given to the statute that, as was said by the Supreme Court of the United States in a case arising under a somewhat similar statute in New Jersey: "It cannot be held that he [the prisoner] was proceeded against under an indictment based upon statutes

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denying to him the equal protection of the laws, or that were inconsistent with due process of law, as prescribed by the Fourteenth Amendment of the Constitution of the United States," (*Bergemann* v. *Backer*, 157 U. S. 655, 658,) or, we may add, by the Fifth Amendment. This exception also must be overruled.

The defendant seasonably filed a plea to the jurisdiction on the ground that the grand jury which returned the indictment was irregularly and unlawfully summoned and convened, in that in the towns of Bedford, Weston and Sudbury the list of persons prepared by the selectmen was unlawfully presented to and acted upon by the voters of said towns, and no lists of jurors from which jurors were to be drawn were prepared by the selectmen of said towns, and no lists were filed with either the town clerk of said towns or with the clerk or assistant clerk of the Supreme Judicial or the Superior Court for the County of Middlesex; and also by reason of the alleged fact that the selectmen of Ayer, Framingham and Westford, from which members of said grand jury were drawn, had not filed with the clerk and assistant clerk of the Supreme Judicial and Superior Courts lists of jurors as required by law; and further because one Norbert M. English, who had been summoned as a member of said grand jury from Bedford and was acting as such when the indictment was returned, was not an inhabitant of Bedford but of Lexington. The Commonwealth demurred to the plea. The court, *Stevens* and *Bell*, JJ., sustained the demurrer and overruled the plea, and the defendant appealed.

We think that the demurrer was rightly sustained. There is nothing to show and it is not claimed that any of the persons from the towns of Bedford, Weston and Sudbury, or from the other towns named were personally disqualified or unfit or incompetent to serve. Although the plea alleges that no lists of jurors were prepared by the selectmen of the towns of Bedford, Weston and Sudbury, or either of them, the affidavits annexed to the plea and referred to in it and made a part of it show that lists were prepared by the selectmen, and in two instances, Bedford and Sudbury, were submitted to and accepted by the voters, and that in the other, Weston, a list was submitted to but not acted on by the voters, on account of an amendment to the law in the preceding year. There is nothing to

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show that venires were not regularly issued and served, or that the jurors were not drawn from the lists prepared by the selectmen in the manner provided by law, or that in preparing the lists the selectmen did not observe the statutory requirements in regard to the persons placed thereon. The irregularity which occurred in submitting the lists to the voters in the two towns of Bedford and Sudbury could have had no effect upon the lists because the voters voted to accept them. Nor were the lists affected in the case of those towns and the other towns named by the failure of the selectmen to file with the town clerk and the clerk and assistant clerk of the Supreme Judicial or Superior Court lists of jurors as required by statute. (St. 1907, c. 348, § 5.) Such failure did not and could not affect in any way the qualifications of the jurors or the preparation of the lists, or the manner of drawing jurors, or the constitution of the jury as finally determined, and the provisions referred to must therefore be regarded as directory and not mandatory; in other words although it no doubt was expected that the scrutiny to which the lists would be thereby subjected would aid still further in the elimination of objectionable persons from juries, the requirements in question are to be regarded rather as incidental than as fundamental.

In the matter of English it does not appear that the selectmen of Bedford knew when English was drawn as a juror from that town that he had removed to Lexington, if indeed he had. The allegation of the plea is that at the time of the finding and return of the indictment he was not an inhabitant of Bedford, not that at the time when he was drawn he was not an inhabitant of Bedford. If he was an inhabitant of Bedford when drawn it would seem that that was enough, and that his subsequent removal before the finding and return of the indictment did not disqualify him from acting with the grand jury. But however that may be, and even if his action in sitting on the grand jury after his removal to Lexington was irregular and improper, the case comes clearly within the principle laid down in *Commonwealth* v. *Brown*, 147 Mass. 585, 593, where one whose name had been ordered by a vote of the town to be stricken from the list was nevertheless drawn as a juror by the selectmen and returned to court as such and was

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sworn as one of the grand jury and acted with them in their deliberations and the return of the indictment. It was held that as there was nothing to show that he was disqualified, or that his being drawn was anything more than an irregularity, a ruling of the trial court that the presentment was valid was correct. See also *Commonwealth* v. *Moran*, 130 Mass. 281; *Commonwealth* v. *Parker*, 2 Pick. 550; *Amherst* v. *Hadley*, 1 Pick. 38.

What we have said in regard to the matter of filing lists with the clerk or assistant clerk of the Supreme Judicial and Superior Courts applies to the case of the juror Wallace from Framingham, whom the defendant contended that he had a right to challenge for cause, since it appeared that the list prepared by the selectmen of Framingham, upon which was his name, had not been filed with the clerk of the Supreme Judicial Court or with the clerk of the Superior Court within the time required by law, it appearing that the list should have been filed on or before the first day of August, 1908, but was not in fact filed until the thirteenth day of April, 1909. The court ruled that the failure to file the list was not cause for challenge, and the defendant excepted. Thereupon the juror was peremptorily challenged by the defendant, and it appeared that when the panel was completed the defendant had not exhausted his peremptory challenges. We doubt whether it can be said as contended by the Commonwealth that the defendant was not harmed by the ruling. But however that may be, we think that for reasons previously stated, and which it is unnecessary to repeat, the ruling was right. It follows that the order sustaining the demurrer and overruling the plea must be affirmed, and the exception to the ruling in regard to the juror Wallace must be overruled.

Certain exceptions which were taken to the admission of certain evidence have been waived, and therefore need not be considered. Other exceptions to the admission of evidence have not been waived, and are relied on and we proceed to consider them. There was evidence that the head had been severed from the body by two cuts, one in the back of the neck and the other in the throat in front severing the arteries. It was in dispute whether the cut in the throat was made before or after death. One of the things relied on by the defendant to show that the cut was made after death and therefore was

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not a cause of death was that it was what was termed "inverted." In the course of the cross-examination by the defendant of Dr. Durell, the medical examiner for the second district of Middlesex County, he was asked, counsel at the time holding in his hand a book from which he was apparently framing the question, "If Professor Balch of the Albany Medical School said that the inverted edge was evidence of a cut after death would that change the opinion which you now express that the . . . [cut] . . . may be *ante mortem?*" Upon objection by the district attorney the question was excluded and the defendant excepted. The question, though put perhaps *alio intuitu*, would if allowed to be answered have placed before the jury in an indirect manner the opinion of Professor Balch who was not a witness in the case or in any way connected with it, and was referred to simply as a medical authority, and it was therefore rightly excluded. It is well settled in this Commonwealth that medical books are not admissible in evidence for the purpose of showing the views entertained by their authors in regard to the matters in dispute. *Commonwealth* v. *Sturtivant*, 117 Mass. 122, 139. The exception is overruled.

It was for the jury to say whether there was evidence which warranted the existence of the events assumed to exist in the hypothetical question put on cross-examination by the district attorney to Dr. Councilman, an expert called by the defendant, and their sequence if that was material. It could not have been ruled as requested that there was no evidence warranting the question in the form in which it was finally put. The exception to its admission must, therefore, be overruled.

Numerous requests for instructions were presented. Many of them were given in substance as requested. Others were given with some modification, and the rest were refused. A number of those refused have been waived or abandoned. It is necessary, therefore, that of those originally presented only the ones now relied on should be considered. Those are the requests numbered 15 to 23, inclusive, and the request numbered 36.

The Commonwealth contended that there was evidence of asphyxiation or strangulation, and of blows on the head, and also that there was evidence that the throat was cut during life. It also claimed that it was not obliged to show the exact sequence

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of the events which resulted in the homicide, or to show that death was due to any one particular cause, but that it was sufficient if the jury were satisfied beyond a reasonable doubt that death was caused by a combination of injuries inflicted by the defendant notwithstanding they were unable to determine the exact way in which the deceased was killed; and the court in substance so instructed the jury. What the court said was, after instructing the jury in regard to the effect to be given to the evidence of mutilation after death, and after giving the ruling requested by the defendant's request in relation thereto, "In this case the exact manner in which he [the defendant] killed his wife, I shall instruct you, is not material. The question is, Did he kill her, and was he sane when he killed her, and was it done with deliberately premeditated malice aforethought, or with malice afterthought? The exact mode it may be impossible for you or for any one else to determine, but the failure to determine the exact way in which she was killed is not to exempt this defendant from punishment provided he did kill her, and killed her with such intention and under such circumstances as to constitute a crime against the law." The court had previously instructed the jury in regard to the degrees of murder, and the burden of proof and the matter of reasonable doubt in a manner to which no exception was taken by the defendant. The requests relied on were to the effect, in one form or another according to the phase of the case with which they dealt, that it was not proved beyond a reasonable doubt that the deceased came to her death in any one of the possible ways testified to. The court was asked to rule, for instance, that "it is not proved beyond a reasonable doubt that the throat of the deceased was cut during life." And the same request was made in regard to death from the blows on the head, and death by strangulation,— the defendant seeking thus to eliminate one by one, as causes of death, the cutting of the throat, the blows upon the head and strangulation, and then contending that inasmuch as it was not proved beyond a reasonable doubt that either one of those things was the cause of death, it followed that death could not have been occasioned by a combination of any or all of them and, therefore (to carry out the reasoning to its logical conclusion), that the Commonwealth had failed to show that the defendant

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murdered his wife, although it was certain, according to his own confession, that he and no one else killed her. The error lies in the assumption which runs through all of the requests relied on that it was necessary for the Commonwealth to show beyond a reasonable doubt the exact mode in which the deceased came to her death. The Commonwealth was bound to show beyond a reasonable doubt that the deceased had been murdered and that the murder was committed by the defendant. It was also bound, as the court instructed the jury, to prove beyond a reasonable doubt every fact necessary to establish those conclusions. If the manner in and the means by which a murder is committed constitute an essential part of the crime, or if a jury could not as matter of fact or as matter of law find that a murder had been committed, if they were unable to find beyond a reasonable doubt the exact mode in which death had been caused, then the instructions requested should have been given. But neither one of the propositions thus suggested is true. The court correctly instructed the jury that the exact manner in which the defendant killed his wife was immaterial, and that the fact that it was impossible to determine the exact way in which she was killed would not serve to acquit the defendant provided the act of killing constituted otherwise a crime. It follows that the requests now relied on were rightly refused and that the defendant's exceptions to such refusal must be overruled.

The result is that we discover no error in the rulings and refusals to rule in regard to what took place at and during and before the trial.

We pass to the second bill of exceptions. The verdict was rendered on Tuesday, May 4, 1909, the case having been on trial since April 20. On the eighth day of the same May, four days after the verdict, Willis A. White, who had been drawn as a juror from Maynard, and who was one of the panel during the trial and at the time when the verdict was rendered, was committed to the insane hospital at Worcester. On the tenth of May the defendant filed a motion for a new trial on the ground that said White was insane during the trial and when the verdict was rendered. There was a lengthy hearing upon the motion. At the conclusion of the testimony the defendant made a large number of requests for rulings and findings, — seventy-two in all.

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The presiding judges overruled the motion and found and ruled as follows: "We find by a fair preponderance of all the evidence as a fact that the juror Willis A. White was of sufficient mental capacity during the entire trial of Chester S. Jordan until after the verdict was returned, to intelligently consider the evidence, appreciate the arguments of counsel, the rulings of law, the charge of the court, and to arrive at a rational conclusion, and therefore we deny the motion. Having found the above fact, we deem it unnecessary to consider the requests for rulings."

The defendant appealed from and excepted to the order overruling the motion, to the findings aforesaid, and to the refusal to rule and find as requested in the seventy-two rulings and findings that were asked for. All of the material evidence taken at the hearing upon the motion is before us. Although the requests were so numerous and voluminous, the issues, as the defendant himself concedes, are comparatively simple.

The principal question relates to the burden of proof and the rule to be applied in weighing the evidence on the question of the juror White's sanity or insanity. If on an issue between the Commonwealth and the defendant as to the sanity of a juror during the trial and at the time of the rendering of the verdict, raised by the defendant by a motion for a new trial, the burden is, as the defendant in substance asked the court to rule, on the Commonwealth to show beyond a reasonable doubt that the juror was sane, then clearly some of the rulings asked for — it is not necessary to decide which — should have been given and the defendant's exceptions should be sustained. There can be no doubt that the defendant has a right to insist that the panel which tries him should consist of twelve sane jurors. And there can be no doubt that if without his knowledge or that of his counsel one of the jurors to whom his case was submitted was insane during the trial and at the time when the verdict was rendered he has not had such a trial as is guaranteed to him by the Constitution of this Commonwealth and by the Constitution of the United States. It is practically agreed that neither the defendant nor his counsel had any knowledge of White's alleged insanity until after the verdict, and therefore no question can arise as to the defendant's right to avail himself of the alleged insanity.

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Ordinarily the party asserting the affirmative of an issue has the burden of proof, and we do not see why the ordinary rule should not apply here. The defendant asserts that one of the jurors was insane during the trial and when the verdict was rendered, and that therefore the verdict should be set aside. It is for him to prove what he says, not beyond a reasonable doubt, but by a fair preponderance of the whole testimony. The inquiry into the sanity or insanity of the juror is not an investigation into an alleged crime, and has none of the elements of such an investigation, and the rules relating to criminal practice and pleading are, therefore, in no way applicable to it. Nor is the sanity or competency of the jury in any way involved in the question of the defendant's guilt or innocence. It is not in the remotest degree an issue in the case. If a question is raised as to the defendant's sanity, that becomes thereby an issue, and the burden is on the Commonwealth to show that he was sane. But that has nothing to do with the question whether a juror was sane or insane during the trial. The Commonwealth was and is no more responsible for the presence upon the panel of the juror White than the defendant or the court. As finally constituted the jury was the tribunal appointed by law for the trial of the case. Its members were selected in the manner provided by law from the body of the citizens of the county, and in case a question arose during or after the trial as to the sanity or insanity of one of them the burden was upon the party alleging the insanity to prove it by a fair preponderance of the evidence, not upon the Commonwealth to show that the juror was sane. It follows from what we have said that the only question that remains is whether there was evidence which warranted as matter of law the findings of fact made by the trial court upon the motion for a new trial. We assume in favor of the defendant that the presiding judges overruled the motion for a new trial not merely in the exercise of their discretion but because they found the facts which they did upon a fair preponderance of the evidence. We do not see how it can be said that there was not evidence warranting their findings.

When the time for the hearing upon the motion approached, counsel for the defendant addressed a communication to the court stating that they deemed it advisable that all of the jurors

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except White should testify, and asking the direction of the court in regard to the matter. The court replied saying that if any of the jurors were called all should be, and that they should be put upon the stand without any previous communication with any one. Thereupon the other eleven jurors were summoned and testified. Of the eleven jurors who thus testified seven said in substance and effect that they saw nothing during the trial in the actions, speech, manner or conduct of White different from that of the ordinary, sane, normal man. The other four jurors were all cross-examined by the district attorney; one testified on such cross-examination that it did not occur to him at any time that Mr. White was insane or that he did not understand the proceedings; another, that until after the verdict he did not see anything in White's acts, speech or conduct that showed that he did not understand the proceedings and the part he took in them, or that his memory was defective; and a third that he did not notice anything about White's memory that was defective any more than that of any other of the jurors, and that he appeared to be as much interested in the trial as any other juror. In addition to the testimony of the jurors there was testimony from Dr. Quinby, the superintendent of the Worcester Asylum to which White was committed, that in his opinion White was sane until the day after the verdict, and that his insanity then was due to the reaction from the strain and stress of the trial and other matters. There was also testimony from the family physician and others tending to show that White was sane. On the other hand there was testimony from medical experts on insanity, including Dr. Jelly, Dr. Sanborn, superintendent of the State Asylum at Augusta, Maine, and Dr. McDonald, formerly at the Butler Asylum for the Insane at Providence, to the effect that in their opinion he was insane during the trial and when the verdict was rendered. There was also testimony tending to show that insanity was hereditary in the family; and there was testimony from neighbors and friends tending to show that he was insane. Letters written by him during the trial which, it was maintained, also tended to show that he was insane, were introduced in evidence. The question before us, however, is not as to the weight of the evidence, but whether it can be said as matter of law that the findings were not warranted by the evi-

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dence. It is plain, it seems to us, that it cannot be so ruled. It follows that the exceptions to findings and rulings and refusals to rule on the motion for a new trial must be overruled.

Order sustaining demurrer to the plea to the jurisdiction affirmed; exceptions contained in both bills of exceptions overruled.

ANASTASEOS KOSTOPOLOS *vs.* JOSEPH PEZZETTI.

Suffolk. November 21, 1910. — January 3, 1911.

Present: KNOWLTON, C. J., LORING, BRALEY, SHELDON, & RUGG, JJ.

Agency, Ratification of acts of agent. *Landlord and Tenant*. *Damages*, In tort: injury to business. *Evidence*, Competency.

At the trial of an action of tort for damages resulting from an alleged unlawful ejection from certain premises, the validity of a lease under which the plaintiff had been in possession of the premises was in question, and there was evidence tending to show that one, who formerly had been collecting the rent from the tenant on behalf of the person named as lessor in a former lease, at the termination of that lease, assuming to act on behalf of and in the name of the lessor, but without his authority, knowledge or consent, executed and delivered to the tenant a new lease not under seal for a further term; that thereafter the lessor, being informed by the rent collector of his act, stated to him, "I am sorry. You ought not to have done it; but, as long as you have done it, let it go"; that the rent collector continued to collect the rents from the lessee for three months, when the lessor himself collected them for three more months, telling the tenant, in answer to a statement by him that he paid his rent to the collector, that he, the lessor, was the one who told the collector to give the tenant the lease, and that he, the lessor, was the one who was entitled to the rent. *Held*, that there was evidence warranting a finding that the lessor ratified the act of the collector in making the lease; and that such oral ratification made the lease valid as against the lessor.

One who unlawfully was ejected by force on a June 12 from premises, of which he was in possession rightfully and where for over six years he continuously had been carrying on a business of selling fruit at retail, and whose business had been interrupted by the eviction, is entitled to such damages as directly resulted from the wrong done to him; but if it appears at the trial of an action to recover such damages that in the conduct of his business the plaintiff had closed the store during certain hours of each day while he and his men peddled fruit from wagons about the streets, and that about a month after the eviction the plaintiff had moved to a location within a few doors of the premises in question, where he continued his business, the plaintiff should not be allowed to testify as to the amount of his weekly profits for about five and a half months before the eviction unless there is some evidence to show that they afforded a fair measure of his business for the future.

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TORT for damages resulting from the alleged unlawful eviction of the plaintiff from a store numbered 77 Winnisimmet Street in Chelsea, where he was carrying on a business. Writ in the Municipal Court of the city of Boston dated June 11, 1908.

On appeal to the Superior Court the case was tried before *Hitchcock*, J. It appeared that from some time in 1901 through 1904 the plaintiff occupied the premises as a tenant at will of the owner, one Marion E. Donnell, and carried on there a retail fruit store. At certain hours of the day he closed the store while he and his men peddled fruit from wagons around the streets. In 1902, one Arthur C. Stone was appointed conservator of the property of Donnell.

On January 1, 1904, Stone, assuming to act as conservator, executed and delivered to the plaintiff what purported to be a lease in writing and under seal of the premises for one year. On January 5, 1907, one Logan, who theretofore had collected the rent from the plaintiff for Donnell and for Stone, and who continued to do so for Stone until March, 1908, executed and delivered to the plaintiff, without the authority, knowledge or consent of Stone, a lease not under seal of the premises for two years. Logan testified that shortly after doing so he told Stone of his action and that Stone said "I am sorry. You ought not to have done it; but, as long as you have done it, let it go." After March, 1908, Stone himself collected the rent from the plaintiff. The plaintiff testified that when Stone demanded the rent, he told Stone that he paid his rent to Logan, and that Stone said that he (Stone) was the one who told Logan to give the plaintiff the lease, and that he (Stone) was entitled to the rent. The rent accordingly was paid to Stone for the months of March, April and May, 1908. The above testimony was controverted by evidence for the defendant.

On June 4, 1908, Stone, assuming to act as conservator of Donnell, executed and delivered to the defendant a lease under seal of the premises for the term of five years from June 1, 1908. The lease contained the clause, "This lease is subject to any existing leases." On June 4, 1908, the defendant gave the plaintiff notice to quit without delay, and on June 12 ejected the plaintiff and his goods. At the time the plaintiff had committed no breach of the lease to him dated January 5, 1907.

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About a month after the eviction, the plaintiff hired a store at number 99 on the same street.

Subject to an exception by the defendant, the plaintiff was allowed to state what his profits per week were from January 5, 1907, to the date of his eviction.

Other facts are stated in the opinion.

At the close of the evidence the defendant asked the presiding judge to rule as follows:

"1. On all the evidence the plaintiff cannot recover.

"2. The lease from Logan to the plaintiff dated January 5, 1907, gave the plaintiff no title. He was therefore a tenant at will.

"3. The lease from Stone, conservator, to the defendant, terminated the tenancy at will of the plaintiff, and the plaintiff cannot recover."

The judge refused so to rule, and ruled that the lease given by Logan to the plaintiff, if ratified by Stone, would give the plaintiff a title to the premises as against the defendant, and that there was evidence for the jury of the ratification of the lease by Stone. He then submitted to the jury the question whether Stone ratified the Logan lease, which the jury answered "Yes." The jury found for the plaintiff; and the defendant alleged exceptions.

The case was submitted on briefs.

C. W. Cushing, for the defendant.

W. H. Brown & J. H. Coakley, for the plaintiff.

SHELDON, J. The lease given by Logan to the plaintiff did not come within the scope of Logan's agency, and was at first invalid. But the jury have found on sufficient evidence that it was ratified by Stone. It was not and did not need to be under seal, and its parol ratification made it valid as against him, whether or not it could have been enforced against Donnell the owner of the property. It then became the ordinary case of an agreement concerning real estate made by an agent in his own name, but adopted by the principal as his agreement. *Buffington* v. *McNally*, 192 Mass. 198. *White* v. *Dahlquist Manuf. Co.* 179 Mass. 427. *Duncklee* v. *Webber*, 151 Mass. 408. The case is not like *Lewis* v. *Buttrick*, 102 Mass. 412. The rights of the defendant, claiming only under Stone, were no greater than those of

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Stone himself. It follows that the defendant had no right to eject the plaintiff, and his requests for rulings were rightly refused.

The plaintiff's damages were not necessarily limited to the value of his leasehold interest. He had been ejected by force from premises of which he was rightfully in possession, and the business which he was there carrying on had been interrupted. He was entitled to such damages as directly resulted from the wrong done to him. He could show the nature and extent of his business and the extent to which it had necessarily been interrupted and the expense which he had been obliged to incur to re-establish his business in another shop; but he ought not to have been allowed to testify to the amount of his weekly profits for the time immediately preceding his eviction. Those profits may have been unusually large, or may have been affected by exceptional circumstances. There was nothing to indicate that they afforded a fair measure of the value of his business for the future. See *Barnard* v. *Poor*, 21 Pick. 378; *Thompson* v. *Shattuck*, 2 Met. 615, 619; *Greene* v. *Goddard*, 9 Met. 212, 331; *Waite* v. *Gilbert*, 10 Cush. 177; *Whipple* v. *Rich*, 180 Mass. 477; *Stynes* v. *Boston Elevated Railway*, 206 Mass. 75.

For the erroneous admission of this evidence, the exceptions must be sustained; but the new trial will be upon the question of damages only.

So ordered.

THOMAS SULLIVAN *vs.* REED FOUNDRY COMPANY.

Worcester. December 2, 1910. — January 3, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Negligence, Employer's liability. *Evidence*, Of defect in appliance. *Practice, Civil*, Exceptions, Verdict.

In an action for personal injuries caused by a heavy casting falling upon the plaintiff owing to the breaking of a hook attached to a chain by means of which it was being hoisted, where the plaintiff contends that the breaking of the hook was due to its own weakness, if it appears that the hook broke while holding a weight much less than a hook of that size, if sound, should have held, that fact unexplained is of itself evidence of a defective condition.

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In an action by a workman against his employer for personal injuries caused by a heavy casting falling upon the plaintiff owing to the breaking of a hook attached to a chain by means of which it was being hoisted, where a count under R. L. c. 106, § 71, cl. 1, alleged a defect in the ways, works or machinery of the defendant and a count at common law alleged that the defendant furnished the plaintiff with dangerous and defective machinery, the defendant excepted to refusals of the presiding judge to rule that the plaintiff could not recover upon either of these counts. There was evidence for the jury of a defect in the hook and of negligence of the defendant in not ascertaining the defect. The jury found for the defendant on the count under the statute and found for the plaintiff on the count at common law. *Held*, that the question, whether there was any inconsistency between the verdict for the defendant on the count under the statute and that for the plaintiff on the count at common law, was not before this court, and that, as the question of the soundness of the hook was left properly to the jury, the defendant's exceptions must be overruled.

In an action by an experienced workman against his employer, for personal injuries caused by a heavy casting falling upon him owing to the breaking of a hook attached to a chain by which the casting was being hoisted, a count of the declaration under the employers' liability act alleged negligence of a superintendent, and the plaintiff contended that the accident was due to a sudden strain brought upon the hook by a slipping of the casting in the chain by reason of the chain having been hitched improperly. There was evidence warranting findings that the chain was placed around the casting by the plaintiff in the manner ordered by a superintendent in charge of the work, that the manner was improper because the casting was likely to slip in the chain and the hook was placed unfavorably to sustain the sudden weight likely to come upon it by such a slipping, and that the breaking of the hook was due to such a slipping of the casting by which the hook was subjected suddenly to an unusually heavy strain coming at an unusual angle. *Held*, that the questions, whether the plaintiff, an experienced workman, in adjusting the chain and the hook acted under the order of the superintendent and whether this order was negligent, were for the jury, and that accordingly the issue presented by the count of the declaration alleging negligence of a superintendent properly was submitted to the jury.

TORT for personal injuries sustained by the plaintiff while in the employ of the defendant from the breaking of a hook at the end of a chain to which was attached a casting weighing about two thousand six hundred and twenty-five pounds, which caused the casting to fall to the ground, striking the plaintiff. Writ dated November 7, 1906.

In the Superior Court the case was tried before *Gaskill*, J. The declaration contained five counts, of which the plaintiff waived the first and fifth. The counts upon which the case went to the jury are described in the opinion, where also the character of the evidence and the material findings warranted by it are described.

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At the close of the evidence the defendant asked the judge to rule as follows:

1. Upon all the evidence the plaintiff cannot recover on the second count in his declaration, and the verdict must be for the defendant.

2. Upon all the evidence the plaintiff cannot recover upon the third count in his declaration, and the verdict must be for the defendant.

3. Upon all the evidence the plaintiff cannot recover upon the fourth count in his declaration, and the verdict must be for the defendant.

The judge refused to make any of these rulings and submitted the case to the jury on the second, third and fourth counts.

In the course of his charge to the jury the judge instructed them as follows: "The next step, as I understand it, is that this hook of the material of which it was composed was not large enough or not heavy enough to carry safely the load under the condition which ought to be anticipated as likely to occur in the business of the employer. Well, what do you say with reference to that? The uses to which it already had been put, the knowledge gained from that use and from the use of similar hooks, similar weight, etc., is a consideration which will bear so far as you think it is material upon that proposition. The fact that it broke at this specific time of course goes without saying now, that it broke if used in the ordinary way with the ordinary expected strain is some evidence of the weakness and defect, but if it broke from an unusual cause, one not to be reasonably expected or anticipated as likely to occur when used with ordinary care by an employee, then the fact it broke would not of itself be evidence of a defect."

The judge submitted to the jury two special questions, which with the answers to them were as follows: First: "Was the breaking of the hook caused by a transverse shock caused by the slipping of the casting?" The jury answered "No." Second: "Was the hook crystallized?" The jury answered "No."

The jury returned a verdict for the defendant on the second count, and a verdict for the plaintiff on the third and fourth counts.

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The defendant excepted to the refusal of his requests for rulings and to the last sentence of the portion of the judge's charge quoted above. After the death of *Gaskill*, J., the exceptions alleged by the defendant were allowed by *Fessenden*, J.

The case was submitted on briefs.

C. C. Milton, G. A. Gaskill & F. L. Riley, for the defendant.

D. I. Walsh, T. L. Walsh & C. B. O'Toole, for the plaintiff.

HAMMOND, J. While the plaintiff was at work for the defendant upon a heavy casting suspended by a hook and chain, the hook broke and the casting fell upon and injured him. Of the five counts in the declaration the case went to the jury upon only the second, third and fourth. The second was under the statute and charged a defect in the ways, works or machinery; the third, also under the statute, charged negligence of a superintendent, while the fourth was at common law, charging that the defendant furnished improper, dangerous and defective machinery. The jury found on the second count for the defendant, and on the third and fourth counts for the plaintiff; and the case is before us upon exceptions taken by the defendant at the trial.

The contention of the plaintiff was that the breaking of the hook was due either to its own weakness or to a sudden strain brought upon it by a slipping of the casting in the chain, or in other words that the cause of the accident was either a weak hook or an improper hitch. The second and fourth counts seem to be based upon the former theory and the third, in part at least, upon the latter. The defendant does not argue, as indeed it could not truly, that there was no evidence of the due care of the plaintiff or that he assumed the risk.

It is strenuously urged however that there was no evidence that the hook was weak. So far as respects the testimony of the experts and of those who had made a personal examination of the hook, it must be said that there is a very strong case made out for the defendant on this point. But after all there was some conflict in this part of the evidence, and it was for the jury to say what credit they would give to Miller, the expert called by the plaintiff. Moreover, one salient fact must not be lost sight of. The hook broke while holding a weight much less than a hook of that size, if sound, should have held. That

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fact unexplained is of itself evidence of a defective condition. *Doherty* v. *Booth*, 200 Mass. 522, and cases cited.

And the fact, if it be a fact, that the verdict for the defendant on the second count shows that the jury found that the hook was not defective is not material. Whether upon the evidence a question should be submitted to a jury manifestly cannot be dependent upon the result which they may finally reach upon the question when it is so submitted. Whether there is any inconsistency between the verdict for the defendant on the second count and that for the plaintiff on the fourth count is not before us. The question of the soundness or suitableness of the hook was properly left to the jury.

The defendant further says that, even if the hook was defective, there is no evidence that the defendant was negligent in not ascertaining that fact. The hook had been used several months. In view of the evidence as to the material of which the hook was made, as to the length of time it had been used, and the kind of use including its exposure to fire, as to the effect reasonably to be expected therefrom upon it by way of crystallization or otherwise, and as to the lack of inspection, the question of the negligence of the defendant was for the jury. The first and third requests were properly refused.

The evidence as to the kind of the hitching, while conflicting, would warrant findings that the chain was placed around the casting by the plaintiff in the manner ordered by Kenney, the superintendent; that this manner was improper in that the casting was likely to slip in the chain, and the hook was unfavorably placed to sustain the sudden weight likely to come upon it by such slipping; that the breaking of the hook was due to a slipping of the casting by which the hook was suddenly subjected to a strain unusually heavy and coming at an unusual angle. While upon this branch the case is close, still the questions whether in all this the plaintiff, an experienced workman, acted under the order of the superintendent, and whether the order was negligent, were for the jury. The third count was properly submitted to the jury.

Exceptions overruled.

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MICHAEL F. SCANLON *vs.* JEREMIAH J. CAREY.

Suffolk. November 9, 1910. — January 4, 1911.

Present: KNOWLTON, C.J., MORTON, LORING, SHELDON, & RUGG, JJ.

Municipal Corporations, Officers and agents, By-laws and ordinances.

In a city which has accepted R. L. c. 104, §§ 1, 4, providing for the regulation by ordinances and by-laws of the inspection, materials, construction, alteration and use of buildings, and that "the superintendent of public buildings or such other officer as the mayor and aldermen . . . may designate shall be inspector of buildings," a person who does not hold any other office in the city cannot be appointed to the office of inspector of buildings.

PETITION, filed on February 7, 1910, for a writ of mandamus commanding the respondent to surrender to the petitioner the office of inspector of buildings of the city of Lawrence, and all things pertaining thereto, alleging in substance that on May 28, 1906, the respondent had been appointed and had qualified to fill that office; that on December 27, 1909, the petitioner had been appointed and had qualified to succeed the respondent therein, and that, although demand had been made upon him, the respondent had refused to turn over "the things and matters pertaining to said office" to the petitioner.

The answer denied the right of the petitioner to the office of inspector of buildings of Lawrence.

There was an agreed statement of facts from which, besides the facts stated in the opinion, it appeared that previous to March 1, 1909, the respondent had held the office of inspector of buildings of Lawrence; that on March 1, 1909, "the mayor announced that, for the good of the service, he removed" the respondent, "inspector of buildings, and said action of the mayor was confirmed by the board of aldermen." Beginning with February 1, and up to and including September 29, 1909, the mayor made thirteen successive appointments to the office of inspector of buildings, one person so appointed being the petitioner. All of the appointments were confirmed by the board of aldermen, and were referred to the common council, which refused to concur therein. On December 27, 1909, the mayor appointed the petitioner to the office, the appointment was confirmed by the

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board of aldermen, and was not referred to the common council. The mayor "declared [the petitioner] elected building inspector." The petitioner took the oath of office, and furnished a bond which was accepted and approved by the mayor and the board of aldermen.

Neither the petitioner nor the respondent at the times of their respective appointments held any other municipal office in the city of Lawrence.

Other facts are stated in the opinion.

The case was reserved by *Loring*, J., "upon the petition, answer, and agreed statement of facts for the consideration of the full court, such order to be entered as justice may require," no formal finding of facts being made.

M. A. Cregg, for the petitioner.

J. P. Sweeney, for the respondent.

KNOWLTON, C. J. The reservation in this case is informal, but the parties have treated it, and we treat it as intended to report to this court questions of law that arose at the hearing, which was all that properly could be reserved or reported under the statute. R. L. c. 173, § 105. *Commonwealth* v. *National Contracting Co.* 201 Mass. 248.

The principal question of law that appears upon the record is whether the petitioner has been legally appointed to the office of inspector of buildings of the city of Lawrence, so that he is entitled to perform the duties of that office, which are now being performed by the respondent. The statute that bears directly upon the case is R. L. c. 104, § 4, which provides that "in a city or town which accepts the provisions of this and the eight following sections or has accepted the corresponding provisions of earlier laws, the superintendent of public buildings or such other officer as the mayor and aldermen of said city or the selectmen of said town may designate shall be inspector of buildings," etc. These provisions have been accepted by the city of Lawrence and are now in force. For a series of years the city acted under them by a designation by the mayor and aldermen of the chief engineer of the fire department as inspector of buildings. In 1906 a building ordinance was passed that presumably was intended to be ordained under the authority of the R. L. c. 104, § 1, which had previously been accepted by

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the city. This ordinance provided for the appointment by the mayor triennially of an inspector of buildings, whose appointment should be confirmed by the city council. It also provided regulations for the inspection, construction and materials of buildings. It is plain that the officer to be appointed under this ordinance was intended to hold the same office and perform the same duties that are referred to in R. L. c. 104, § 4. In the provision for his appointment by the mayor, subject to confirmation by the city council, instead of a designation by the mayor and aldermen, the ordinance is in conflict with the statute, which evidently did not intend to increase the number of persons holding office, but simply to add another office to that of the superintendent of public buildings, unless the mayor and aldermen designated some other officer of the city to be the incumbent of the new office. In the original enactment in the St. 1878, c. 47, § 1, the words, "of said city," followed the words "or such other officer," and the meaning was not changed by the re-enactments in the Public Statutes and in the Revised Laws without these words. Unless the mayor and aldermen desired the superintendent of public buildings to hold the office, they should have designated some other officer of the city for the place. They could not increase the number of officers in the city by electing to this office a person who held no other office. The original attempt of the mayor to appoint the petitioner under the ordinance, and later to appoint numerous other persons in succession under the ordinance, was of no effect, not only because the city council refused to confirm the appointments, but because the ordinance in that part which prescribes an appointment and confirmation seeks to set aside the statute which calls for a designation in a different way.

The statute being in force, and providing the only way in which one can legally become an inspector of public buildings, the attempt to appoint the petitioner was ineffectual, because it was not a designation by the mayor and aldermen of an officer of the city other than the superintendent of public buildings, but was an appointment of a person who was in no way connected with the official business of the city. The petitioner shows no right to the office.

Petition dismissed.

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CYRIL J. LARIVEE *vs.* MICHAEL A'HEARN.

Suffolk. November 10, 1910. — January 4, 1911.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Contract, Construction. *Agency*, Scope of authority. *Architect.*

A contract in writing between an architect and one for whom the architect was supervising the construction of a building provided that the owner of the building should employ the architect "to supervise and direct the construction of said building and to make all contracts for the furnishing and erection" of it for the owner and in his behalf, that the owner should furnish at a certain hour on each Saturday "such sums of money to cover the expenditures of the preceding week as may appear to be necessary from an estimated list made up by said architect and furnished said owner before the close of business on Friday preceding," that the owner should keep in the hands of the architect a sum not greater than $100 as an "expense fund for the defraying of small incidental expenses connected with said work," and that the owner should "furnish to said architect a sum of money sufficient to pay all lumber bills and material bills within such time after the delivery of the materials as will enable the architect to take the cash discounts"; and the architect agreed "to supervise and direct the construction of said house in accordance with said plans and specifications, to receive bids for the various parts of the work and to make contracts therefor in the name of the owner, to verify all material and labor bills and to pay for the same with money to be furnished by the owner." In an action by one who at the request of the architect furnished lumber which was used in the construction of the house, the owner knowing neither of the ordering, furnishing or using of the lumber, it was *held*, that the architect had authority to contract in behalf of the owner for materials used in the construction of the house.

CONTRACT upon an account annexed for the purchase price of certain lumber. Writ in the Municipal Court of the City of Boston dated November 20, 1908.

On appeal to the Superior Court the case was tried before *Hardy*, J. It appeared that the defendant executed a written contract with one A. Y. Pearl, an architect, with regard to the construction of a house for the defendant, the material portions of which are as follows:

The defendant agreed to "employ the said architect to supervise and direct the construction of said building and to make all contracts for the furnishing and erection of the different portions thereof for him and in his behalf.

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"To furnish by ten o'clock A. M., on each Saturday, such sums of money to cover the expenditures of the preceding week as may appear to be necessary from an estimate list made up by said architect and furnished said owner before the close of business on Friday preceding.

"To place in the hands of said architect before the commencement of the work, the sum of One Hundred Dollars ($100) as an expense fund for the defraying of small incidental expenses connected with said work, and to replenish this sum from time to time as becomes necessary.

"To furnish to said architect a sum of money sufficient to pay all lumber bills and material bills within such time after the delivery of the materials as will enable the architect to take the cash discounts. . . ."

The architect agreed "to supervise and direct the construction of said house in accordance with said plans and specifications, to receive bids for the various parts of the work and to make contracts therefor in the name of the owner, to verify all material and labor bills and to pay for the same with money to be furnished by the owner."

At the request of Pearl the lumber described in the account annexed to the plaintiff's declaration was delivered and used in the construction of the house and the price set forth in the plaintiff's declaration was a reasonable price for the lumber described therein. It did not appear that the defendant had any knowledge of the delivery or that he had any knowledge of the fact that the lumber was used in the construction of the house.

At the close of the evidence, the defendant asked the presiding judge to rule as follows:

"1. Upon all the evidence in the case, the verdict should be for the defendant.

"2. Upon all the evidence in the case, the jury cannot find that A. Y. Pearl was authorized by the defendant to enter into any contracts for the materials described in the plaintiff's declaration.

"3. Upon a fair construction of the contract in writing between the defendant and A. Y. Pearl, no authority is given to said Pearl to contract in behalf of the defendant for the materials described in the plaintiff's declaration."

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The rulings were refused. The jury found for the plaintiff; and the defendant alleged exceptions.

S. R. Cutler, for the defendant.

G. W. Reed, for the plaintiff, was not called upon.

MORTON, J. This case is here on the defendant's exceptions, and the only question is whether the architect had authority to contract on the credit of the defendant for the lumber which is the subject of this suit. The lumber was delivered upon the defendant's premises and was used in the construction of a building which was erected thereon under the supervision and direction of the architect who was acting in relation thereto under a written contract between himself and the defendant. The defendant had no knowledge of the delivery of the lumber or that it was used in the construction of the building. The contract provided amongst other things that the defendant "should furnish said architect a sum of money sufficient to pay all lumber bills and material bills within such time after the delivery of the materials as will enable the architect to take the cash discounts"; and the contention of the defendant is that this and another similar provision in regard to the defendant's furnishing money to the architect to pay the bills excludes by necessary implication any power or authority on the part of the architect to pledge the defendant's credit therefor. But the contract provides in express terms that the architect shall "make all contracts for the furnishing and erection of the different portions thereof [meaning the building] for him [the defendant], and in his behalf"; that he shall "receive bids for the various parts of the work, and . . . make contracts therefor in the name of the owner"; and that the defendant shall "furnish by ten o'clock A. M. on each Saturday, such sums of money to cover the expenditures of the preceding week as may appear to be necessary from an estimate list made up by said architect and furnished said owner [the defendant] before the close of business on Friday preceding." This last provision clearly implies that the money is not to be furnished till after the bills are contracted and, when taken in connection with the provision that the architect is to make all contracts in the name of and in behalf of the defendant, plainly shows that it was contemplated and understood between the architect and the defendant that the former should have

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authority to pledge the latter's credit for materials used in the construction of the building. The rulings requested were, therefore, rightly refused.

Exceptions overruled.

MAX LANTIN *vs.* EDWARD B. GOODNOW & others.

Norfolk. November 10, 1910. — January 4, 1911.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Conspiracy. Fraud. Joint Tortfeasors. Executor and Administrator.

One who for many years had carried on a "bucket shop" business, representing it to be a legitimate brokerage business, realizing from his physical condition that he might die suddenly, and from the financial condition of his business that because of lack of confidence among his customers the business thereupon might fail, with an intention of causing the business to be continued after his death without interruption until claims of creditors against his estate would be barred under R. L. c. 141, § 9, falsely represented his assets to be largely beyond their real value, made a will containing provisions directing the executors to assist the business with funds after his death and associated with himself two partners who agreed to carry out these intentions. After his death the two partners did as they had agreed, and the executors of the will, who were the testator's widow, son and daughter, and who would benefit personally from the assets of the estate not being subject to be reached by creditors of the business, at first innocently but afterwards knowingly assisted in the carrying out of the scheme. At the end of two years from the giving of bonds by the executors, the partners were adjudicated bankrupt. In an action jointly against the two partners and the executors as individuals by a creditor, who had been a customer of the partnership before the death of the testator because he was deceived into thinking that theirs was a legitimate brokerage business, and who had been paid the balance due him at the testator's death and had continued a customer thereafter without knowledge of the death and because of the fraud of the testator participated in by the partners and by the widow and children as executors, it was *held*, that, not only the fraudulent partners, but also the widow and children of the testator were liable for the damages suffered by the plaintiff because of the fraudulent conspiracy jointly practised by them, and that this conclusion was not affected by the fact that the balance due to the plaintiff at the time of the testator's death had been paid, nor by the fact that payments made to the partnership by the widow and children had been made by them as executors, it appearing that such payments were made for their personal benefit.

CONTRACT OR TORT against Edward B. Goodnow, Anna F. Goodnow, Mabel L. Goddard, James Kennedy and Charles R.

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Worth, with a declaration in two counts, one in contract and the other in tort. Writ dated November 22, 1906.

The count in contract was abandoned by the plaintiff both at the hearings before the auditor and at the trial, and the case was tried on the count in tort which in substance was as follows:

"Count 2. That on or about July 1, 1903, Nathan B. Goodnow and the defendants, Kennedy and Worth, were copartners in the banking and brokerage business under the firm name and style of N. B. Goodnow & Company; that on or about the date aforesaid the said Goodnow, Kennedy and Worth unlawfully conspired to cheat and defraud the plaintiff, and in pursuance of such unlawful conspiracy represented to the plaintiff that they were solvent, that they were legitimate stock brokers and not bucket shop brokers, and that they did fulfil and intend to fulfil all orders to buy and hold stocks for their customers and all orders to sell stocks and hold the proceeds on deposit. They made these statements of fact, which were false and which they knew were false, in order to defraud the plaintiff by inducing him to become their customer, and the plaintiff, relying thereon, employed them as his brokers and at divers times gave orders to buy shares of stock in his name and hold the same for him, sent money to pay for the same, and gave orders for the sale of part thereof and for the retention of the proceeds thereof on deposit for him. The said firm, upon receipt of each such order, in pursuance of the said unlawful conspiracy, notified the plaintiff of the fulfilment thereof. According to their reports, and according to their legal obligation in the premises, they held for him and should hold for him certain valuable shares of stock, and owed and should owe him certain large sums of money on or about November 6, 1903. As a matter of fact said firm were not legitimate stock brokers, but were bucket shop brokers and in pursuance of the said unlawful conspiracy never bought the stock ordered by him, did not hold it for him, did not sell it as ordered, and did not retain the proceeds thereof on deposit for him, and were, on the said first day of July, 1903, and at all times since that date have been, utterly and hopelessly bankrupt and insolvent, as they at all times herein stated well knew.

"That on or about November 6, 1903, Nathan B. Goodnow died, leaving a will which was duly allowed and proved in this

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Commonwealth on December 2, 1903, and on the same date Edward B. Goodnow, Anna F. Goodnow and Mabel L. Goddard were duly appointed executors thereof and duly gave bonds as such. Said Nathan B. Goodnow had for some years past been drawing funds from the firm and had amassed therefrom a large amount of assets, although entirely insufficient even when joined with the firm assets and the assets of the other partners to meet the firm obligations. In pursuance of the said unlawful conspiracy and for the purpose of successfully carrying out the same, said Nathan B. Goodnow by his will left certain large sums of money to Kennedy and Worth to carry on the business of said firm without interruption in the same name, same manner and at the same place, and to represent falsely and knowingly so to the plaintiff that they had been on or about July 1, 1903, and still were solvent, that they had been and were still legitimate stock brokers, and not bucket shop brokers, that they had fulfilled and still intended to fulfil all the plaintiff's orders to buy stocks, to hold them for the plaintiff, to sell them and retain the proceeds for the plaintiff, and that they then held as a matter of fact certain valuable shares of stock for him and certain deposits of money as per his orders. This was done by the said Nathan B. Goodnow for the specific purpose of defrauding the plaintiff by inducing him to continue to be a customer of N. B. Goodnow and Company, and to give orders to buy shares of stock in his name, and hold the same for him, send on money to pay for the same, give orders for the sale of part thereof from time to time, and the retention of the proceeds thereof on deposit for him, and to give further orders to buy shares of stock in his name and hold the same for him, to order the application of proceeds held on deposit for him to that purpose, and to send on further money to pay for the same, and this was done by the said Nathan B. Goodnow for the ultimate purpose of keeping the concern going and concealing its insolvency until the two years from the date of the filing of the executors' bond should elapse and until the plaintiff and other creditors should be barred by the statute of limitations from recourse against his estate for the money of which he had defrauded them. Said Kennedy and said Worth participated in this conspiracy with full knowledge of the facts and of the specific and ultimate purposes said Nathan B. Goodnow

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desired to accomplish. Edward B. Goodnow, Anna F. Goodnow and Mabel L. Goddard aforesaid, with full knowledge of all the facts above recited, with full knowledge of the specific and ultimate purposes of the conspiracy aforesaid and for the purpose of successfully carrying out the same and of defrauding the plaintiff in pursuance thereof, saw to it that this money was paid to Kennedy and Worth and that when this proved insufficient, certain other sums of money were advanced out of said Nathan B. Goodnow's estate to said Kennedy and Worth in pursuance of the said unlawful conspiracy and to carry out and accomplish all the purposes aforesaid in the manner detailed above and at all times herein stated and in all ways in which they possibly could, participated in and aided in the execution of the unlawful conspiracy aforesaid with full knowledge of all the facts pertinent thereto. Said Kennedy and Worth in pursuance of said unlawful conspiracy and in order successfully to consummate the same, carried on the business of said firm without interruption in the same name, same manner and at the same place, did not notify the plaintiff of the death of Nathan B. Goodnow and represented to the plaintiff falsely and knowingly so that they had been on or about July 1, 1903, and were still solvent, that they had been and were still legitimate stock brokers and not bucket shop brokers, that they had fulfilled and still intended to fulfil all the plaintiff's orders to buy stocks, to hold them for the plaintiff, to sell them and retain the proceeds for him, and that they then held as a matter of fact certain valuable shares of stock for him and certain deposits of money as per his orders. They did this to lead the plaintiff to believe that all was well, to induce him to refrain from hostile action, to induce him to refrain from closing up his account with them and to lead him to continue to deal with them and to send on to them further sums of money and they did all this at the request of and in accordance with the instructions of Nathan B. Goodnow, Edward B. Goodnow, Anna F. Goodnow and Mabel L. Goddard, and each of them, and in pursuance of the unlawful conspiracy aforesaid. The plaintiff relied on these facts and representations, believed all was well, refrained from hostile action, did not close up his account with them, and continued to deal from time to time with them, sending in money, ordering purchases of stock in his name and the

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holding thereof for him, and ordering sales of part thereof and the retention of the proceeds on deposit for the plaintiff, and ordering further purchases of stock in his name and the holding thereof for him and the application of the proceeds on deposit for him in part payment thereof and sending in further large sums of money therefor. The said firm upon the receipt of each such order notified the plaintiff of the fulfilment thereof and rendered to the plaintiff monthly statements of his account with said firm. On January 1, 1906, said firm purported to hold for the plaintiff . . . [certain] . . . shares of stock . . . and to hold . . . on deposit for him, $4,569.85. As a matter of fact the said firm had never bought the said shares of stock, did not hold them, and did not hold the said sum of money on deposit for the plaintiff, all of which the said firm and the said Edward B. Goodnow, Anna F. Goodnow and Mabel L. Goddard well knew. On or about January 1, 1906, the plaintiff demanded of said firm that they should deliver to him the said shares of stock and the said sum of money on deposit, but said firm refused and though often requested, still refuse to deliver and pay the same.

"On December 12, 1905, Edward B. Goodnow, Anna F. Goodnow and Mabel L. Goddard ceased to advance any further sum of money out of N. B. Goodnow's estate to the firm and ceased to assist them in the various ways in which they had previously been participating in and aiding in the fulfilment of the conspiracy aforesaid, since the two years had now elapsed within which the plaintiff must have brought action against the said estate for the property of which he had been defrauded, and since they believed that the ultimate purpose of the said unlawful conspiracy as far as they were concerned had been accomplished. Shortly after the first day of January, 1906, the said firm was duly adjudicated bankrupt and the assets of the firm's estate in bankruptcy were and are of insignificant value.

"The plaintiff says that he has been defrauded of the said sum of $4,569.85, and of the said shares of stock, . . . owing to the fraud and deceit of the defendants and of each of them, and owing to the unlawful conspiracy conceived by said N. B. Goodnow and carried out by all of the defendants in concert, with full knowledge of all material facts and for the purposes aforesaid."

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The case was referred to Edmund A. Whitman, Esquire, as auditor, and afterward was tried before *Bell*, J. The facts are stated in the opinion.

At the close of the evidence, the presiding judge ordered verdicts in favor of the three defendants, Edward B. Goodnow, Anna F. Goodnow and Mabel L. Goddard; and the plaintiff alleged exceptions.

Against the other defendants, James Kennedy and Charles R. Worth, the jury found for the plaintiff in the sum of $12,049.97.

D. A. Ellis & S. M. Whalen, for the plaintiff.

J. E. Hannigan, (*C. G. Bancroft* with him,) for the defendants.

KNOWLTON, C. J. This is an action to recover damages for frauds practised upon the plaintiff in connection with the business of the firm of N. B. Goodnow and Company, who advertised as bankers and brokers doing business in Boston and New York. The defendants are one Kennedy and one Worth, the surviving members of this firm, and the widow and son and daughter of N. B. Goodnow, who were the principal legatees and devisees under his will. The plaintiff obtained a verdict against Kennedy and Worth. A verdict for the other defendants was directed by the presiding judge. The case is here on the plaintiff's exception to the direction of this verdict. There was an auditor's report from which we make extracts as follows: "Nathan B. Goodnow did business in Boston for a number of years prior to 1900, ostensibly as a banker and broker. The defendants, Kennedy and Worth, were in his employ for a number of years. Worth, who is now forty-two years of age, entered Mr. Goodnow's employ when he was twenty-one as a clerk, and worked up to the position of managing the finances of the business under Mr. Goodnow's personal supervision. Mr. Kennedy, who is now sixty-five, entered Mr. Goodnow's employ in 1883. His previous experience had been on a farm, in teaching school and as a bookkeeper and clerk for some book publishers. For some years previous to his death Mr. Goodnow had shown signs of an apprehension of impending death through some trouble with his heart; having been a heavy smoker he practically gave up smoking, was careful in his habits of exercise and, while he said nothing about his own condition, spoke of members of his

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family as having had difficulty in that way and that he might go as they did. Somewhere about the year 1900 he called Kennedy and Worth into his office and told them that he was going to take them into partnership, saying that they had been faithful and that they ought to share in the business. He said that they ought to make enough in a few years to enable them to retire, and named a sum with which they ought to be satisfied, and that they might take one third and he would take two thirds, and said that he would allow the use of his name for two years should he die. He told them further that he wanted them to agree to carry the business on after his death, as he did not want his family to know the kind of business he had been doing, which was what is technically known as a bucket shop, where, when a customer gives an order to purchase, or sell, shares of stock the broker does not carry out the order, but credits or charges the customer with the price at which the stock may be selling upon the stock exchange at that particular time. He said further that his son lived in Detroit and was sickly and he did not want him to carry on the business. At Goodnow's request Kennedy and Worth promised to continue the business. No partnership papers were then drawn up and the business went on under an oral partnership, the parties performing the same duties they had previously performed and in the same manner, with substantially the same salaries, and with no more real control over the business. Notices were, however, sent out that such a partnership had been formed. Mr. Goodnow made a will, which was dated October 4, 1902, and, at or about that time, informed Kennedy and Worth of the provisions therein for their benefit which were contained in the seventh clause of the will and were to the effect that all his interest in the business of Nathan B. Goodnow and Company was to be given to his partners, and that they were to have half of his life insurance, which amounted to $68,000, absolutely, and the other half was to be loaned to them at three per cent interest without security and to be repaid in five equal annual instalments. . . . In March, 1903, formal articles of copartnership were drawn up and signed. Mr. Goodnow prepared a draft in his own handwriting and read it to Kennedy and Worth, and subsequently had the matter put in typewritten form, when it was executed by them all." Under

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these articles Goodnow was to contribute the established business of Nathan B. Goodnow and Company, conducted in Boston and New York, with all the property in the business, and it was provided that Goodnow should draw from the firm $3,300 per annum, and each of the others $1,300 per annum; that profits might be drawn upon the consent of the parties in writing, and that they should be divided in the proportion of one half to Goodnow and one fourth to each of the others; that at the death of either partner, his interest should cease, and his legal representatives should not receive anything from the firm, and that the firm name of Nathan B. Goodnow and Company should be discontinued within two years of his retirement or decease. "Mr. Goodnow told Kennedy and Worth that he saw no reason why they all could not get rich out of it, and that in two years' time they ought to be in very good condition, and that he would let them have the use of his name for that time and at the end of it they could quietly change the name of the business so that it would not make any difference with the customers, and that he did this so that the customers would not come upon them suddenly for their balances. He did not want them to be embarrassed. He again told them what provision he had made for them in the will by his insurance, and with what money there was coming in they ought to be able to carry on the business without trouble. He again reiterated that he did not want his son or daughter to know the character of the business, but they (the son and daughter) thoroughly understood that if Kennedy and Worth wanted more money they could have it. No other reason was given by Mr. Goodnow for limiting the use of his name to two years, and nothing was said about any liability of his estate for the debts of the business. Somewhere about 1893 Mr. Goodnow had built the Grand Opera House in Boston, which cost him about $250,000, and the funds therefor had been drawn by him from the business. Some time before 1900 he had furnished money for the support of a theatrical company, and later had furnished the financial backing for Alexander Salvini, both of which had been losing ventures. The funds for these had been taken from the business, and, as a result, the business had been very seriously crippled, at one time the concern having but $10,000 of available assets in the business.

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"Mr. Goodnow, apparently realizing this situation, had published and sent to customers a circular . . . in which he called attention to the amount of real estate standing in his name, assessed at $235,000, which was part of his assets, and therefore the assets of the firm, and an advertisement to substantially the same effect was inserted in the Boston Journal, and ran regularly for a number of years, once every two weeks. Mr. Goodnow's nominal capital on the books of the firm was carried as $200,000, and upon this he drew two per cent per annum.

"A few days before Mr. Goodnow died, Mr. Worth had a conversation with him in which Mr. Goodnow recognized his impending death, and when Mr. Worth reminded him of the condition of the business and that there were not assets immediately available in the business sufficient to pay its indebtedness in full, said that he was aware of that, but that he had a thorough understanding with his heirs and that Kennedy and Worth were to have money to run the business if he was taken away. At that time the obligations of the firm were about $400,000, and the amount of available securities in their hands for the payment of such obligations was only about $125,000."

The inventory filed after Goodnow's death showed personal property appraised at $136,855.86 and real estate appraised at $167,450, not including any interest in the firm, nor certain property owned by him in Detroit. He died on November 6, 1903; and on December 2, 1903, his widow, son and daughter qualified as executors of his will. The firm gave no notice of his death, but Kennedy and Worth continued the business under the same firm name and in the same way as in his lifetime, until their failure in January, 1906. The plaintiff continued to do business with the firm, and had no knowledge of any change in it until the bankruptcy of Kennedy and Worth. Long before that time he had received a copy of the circular stating Goodnow's investment in real estate. His first transaction with the firm was in July 2, 1903, when he ordered the purchase of one hundred shares of a certain stock, and at intervals he ordered other purchases and sales, and sent and received money, so that, at the time of the firm's failure, they owed him a balance of $4,569.85 in money, and he was entitled to receive

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from them shares of different stocks worth $5,237.50, which they did not have in possession and could not deliver. He received from them accounts of their dealings from time to time, which represented that they had made real purchases and sales on his account, and, until their failure, he supposed that such purchases and sales had been made.

There was some delay in furnishing Kennedy and Worth with the insurance money to be paid them under the will. They received the amount which was payable to them absolutely in sums of $5,000 or $10,000 at a time, which were paid through the son Edward B. Goodnow; but up to September, 1905, they had received but little of the part to be lent to them. In this month of September, in connection with their requests for money, a conference was had between them and an attorney who had acted for N. B. Goodnow in his lifetime and who represented the executors after his death, and Goddard, who was the husband of the testator's daughter. At this interview Goddard and the attorney were told of the embarrassed condition of the firm at the time of Nathan B. Goodnow's death; that it was and always had been a bucket shop, meaning that it made fictitious purchases and sales of stock and false returns to customers that purchases and sales were actually made, and that it was then in an embarrassed condition. At another interview, a little later, when these persons and Edward B. Goodnow and his father in law, a lawyer from Detroit, were present, the same matters were talked over. According to the testimony, Goddard said that they would have to take care of them (the firm) until the two years expired. "He said, 'Of course we will let you have money.' . . . 'We are obliged to. We will have to until the two years are up, at any rate.'" He said: "Yes, we will have to give you money. They are bound to take care of you." There was evidence that after that one of the partners went to the attorney's office almost every afternoon, at his request, to let him know how things were, and that, after the firm got into difficulty, there were no cases that he did not report. In one matter a letter was dictated by the attorney and signed by the firm. There was evidence that at one of these interviews the defendant Edward B. Goodnow said, "I shall advise putting every cent into this — every cent of the estate, to keep

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father's name from being ground in the dust." Payments were made at different times after this to the members of the firm before the expiration of two years from the appointment and qualification of the executors. A payment of $2,000 was also made on December 2, 1905, the day on which the two years expired, one of $3,000 on December 16, 1905, and one of $1,000 on January 2, 1906. The defendants then refused to pay anything more, and on January 6, 1906, the firm stopped business.

There was testimony that, while he was in the hospital, just before he died, N. B. Goodnow, in reply to an inquiry from them as to whether he realized how things were in the business if anything happened to him, said: "Yes, I have made provision for that. I think my heirs thoroughly understand, and will advance money to take care of anything that comes up." He said of the money in the business: "That and the insurance that you will get ought to tide things along for some time. . . . Ned and Joe [meaning his son and son in law] thoroughly understand the situation and will help you to a certain amount," stating the amount as $20,000 or $30,000 which was not included in the insurance.

The business of the firm, as it was conducted, was unquestionably a fraud upon the plaintiff, which made the defendants Kennedy and Worth liable to him for the wrong. *Todd* v. *Bishop*, 136 Mass. 386, 391. *Tallant* v. *Stedman*, 176 Mass. 460. There was evidence proper for the consideration of the jury upon the question whether N. B. Goodnow, having invested a large amount of property outside of his business and apprehending his early death, and knowing that there was a great risk, if not a strong probability, that the debts of the business at the time of his death would greatly exceed its assets, formed a scheme to take Kennedy and Worth into partnership with him, and to arrange with them to carry on the business without change for two years after his death, while many of the creditors would remain ignorant of his death and be lulled into security until their claims would be barred by the special statute of limitations. It was consistent with such a scheme that the advertisement in the Boston Journal, containing the substance of the circular setting forth the strength of the firm and its large investments in real estate, was continued without

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change until January, 1906. The provision in the will as to the life insurance was such that the whole of it would be available for use in the business "to tide things along for some time," while half of it would be a debt in favor of his family if the business should turn out fortunately. Worth testified as to what he said about the use of the firm name for two years; "that was, of course, not to arouse the suspicions or the anxiety of our customers so that they would not make any great demands on us." He also testified that when the papers were first drawn up there was nothing about the insurance, but that afterwards Goodnow told him "he had written up a new clause, and he was going to leave the whole of the insurance with us," etc.

If the testator devised this scheme to defraud his creditors, and to secure to his family a large amount of property that otherwise would have been used in paying his debts, the scheme contemplated the probability that their customers might continue doing business with the firm, relying upon the indications and representations of its financial strength, and be defrauded by transactions of the bucket shop which they supposed were real purchases and sales. It contemplated the continuance of his fraud, as he planned it, for two years. It looked to a possible loss to the plaintiff and other creditors, as a consequence of the execution of the plan. The fraud was that of the testator through the whole two years while it was in the course of execution by his representatives as he intended it to be executed. If the statute provided for the survival of such a cause of action, the estate of the testator would be liable for the fraud.

There was evidence for the consideration of the jury on the question whether these defendants, the sole beneficiaries of the fraud, adopted it and participated in it for their own benefit, after they became aware of its nature. There were circumstances from which the jury might infer that all of the defendants learned of the facts and knew of the fraud in the autumn of 1905. There was evidence tending to show that the female defendants authorized the attorney and Goddard to do anything that they thought for the interest of these beneficiaries in the management of the business. Notwithstanding that the will called for loans from the insurance money to the firm by the

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executors, the jury might find that these defendants became convinced that these provisions of the will were a part of a plan to defraud creditors of the firm, and made the payments in their own interest to consummate the fraud, although the payments were in the form of loans. If they adopted this fraud with knowledge of its nature, and assisted in carrying it through to execution for their own benefit, they are liable to the plaintiff for all damages suffered from it. *Patten* v. *Gurney*, 17 Mass. 182, 185. *Brown* v. *Perkins*, 1 Allen, 89, 98. *Boston* v. *Simmons*, 150 Mass. 461. *Oulighan* v. *Butler*, 189 Mass. 287, 293. The fact that the debt existing in the plaintiff's favor when the testator died was paid does not relieve them from liability for the consequences which resulted directly to the plaintiff from the execution of the fraud, and which presumably was contemplated by the testator as likely to result.

The fact that a will had been proved, of which the defendants were executors, and that the payments were such as the executors were directed to make is no justification of the payments, if they were made by the beneficiaries under the will in their own interest, when they knew that the making of the will was a part of a fraudulent scheme to continue the business in such a way as to defraud creditors and others for the benefit of these defendants, and if they made the payments to assist in the consummation of the fraud. Even as executors they might have been justified in disregarding the directions of the will and declaring the estate insolvent, or taking other measures to give creditors the benefit of payment from the testator's property.

We are of opinion that the evidence against these defendants should have been submitted to the jury.

Exceptions sustained.

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THOMAS J. TOBIN *vs.* CHRISTOPHER KELLS.

Suffolk. November 10, 1910. — January 4, 1911.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Practice, Civil, Auditor's report, Exceptions. *Contract,* Rescission, Performance and breach, Consideration. *Words,* "Perfect satisfaction."

No exception lies to the denial of a motion to recommit an auditor's report with an instruction to the auditor to report all the evidence on which he based a certain finding.

In refusing to entertain an exception to the denial of a motion to recommit an auditor's report, it was *said,* that, although it is a proper exercise of judicial discretion for a trial judge to recommit an auditor's report where it appears that the auditor has made an erroneous ruling which is likely to deprive a party of important rights, yet the mere fact that an auditor has erred upon abstract questions of law, which can be raised afterwards at the trial, does not make it necessary to recommit his report.

In refusing to entertain an exception to the denial of a motion to recommit an auditor's report with an instruction to the auditor to report all the evidence on which he made a certain finding, it was *said,* that, even if this court had had authority to review the exercise of the discretion of the trial judge, the bill of exceptions here presented no means of doing so, as it did not show what facts, if any, were before the judge when he denied the motion.

In an action on an account annexed for labor and materials furnished by the plaintiff to the defendant in the remodelling of certain houses, the defendant relied on a contract in writing for the work, which the plaintiff had abandoned, and the plaintiff contended that the abandonment of the contract in writing was by mutual agreement of the parties. An auditor found and reported that the contract in writing had been annulled by the parties. The plaintiff testified that he asked the defendant whether he was going to make a payment to the plaintiff in accordance with an oral agreement modifying the terms of the original contract, that the defendant said "No," whereupon the plaintiff said that under the circumstances all he could do was to quit, to which the defendant replied, "Quit and be damned," and that thereupon the plaintiff did quit and brought his action. *Held,* that the finding of the auditor was *prima facie* evidence on which the jury had a right to find that the contract in writing was rescinded, and that they could make the same finding upon the testimony of the plaintiff, as an assent by the defendant to the plaintiff's proposition to abandon the work would be sufficient although given angrily and with an oath.

In an action on an account annexed for labor and materials furnished by the plaintiff to the defendant in the remodelling of certain houses, the defendant contended that the plaintiff could not recover because he had not completed his contract, and the plaintiff contended that he was prevented from doing so by the wrongful conduct of the defendant. The plaintiff testified that, shortly after a contract in writing had been made for the work, he told the defendant that he had been disappointed in regard to obtaining money to use upon the work and that it would be very hard for him to keep on with the contract, and

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that an oral agreement then was made between the parties changing the terms of the contract in writing as to the payments to be made by the defendant, so that the defendant should pay to the plaintiff a certain sum of money each week, if the payments thus to be made did not exceed the next instalment fixed by the contract in writing, and there was evidence on which the jury could have found, in spite of evidence of the defendant to the contrary, that a modification of the contract was made, and that it was made in consequence of the plaintiff's statement to the defendant, which was understood by both parties to be in substance a statement that the plaintiff could not go on with his work and must abandon the contract unless it was modified. It appeared that the defendant afterwards refused to make any further payments required by the modified agreement testified to by the plaintiff, and that the plaintiff thereupon abandoned the work and sued the defendant for damages. *Held*, that, under the decisions of this court, the modification of the contract, which could have been found to have been made, could have been found to have had a good consideration and to be binding on the parties, and that therefore the jury could find that the defendant unjustifiably prevented the plaintiff from going on with his work under the contract, and thus released him from any obligation to complete it.

A contract in writing to do certain work in remodelling certain houses to the "perfect satisfaction" of the owner, means that the work shall be performed in such a manner that a reasonable man ought to be satisfied with it.

CONTRACT on an account annexed for labor and materials alleged to have been furnished by the plaintiff to the defendant in the remodelling of certain houses in that part of Boston called South Boston. Writ dated June 24, 1907.

In the Superior Court the case was referred to Everett C. Bumpus, Esquire, as auditor, who filed a report.

There were two bills of exceptions. The first related to a motion to recommit the auditor's report, which was heard by *Richardson*, J. That bill of exceptions was as follows:

"The case was referred to Everett C. Bumpus, Esquire, as auditor, who reported, among other things, that the plaintiff began work under written contract, and stated, 'I find that the contract was annulled by the mutual action of the parties.' The auditor's report, as annexed to another bill of exceptions in the case, may be treated as a part of this bill of exceptions. The defendant thereupon moved that the court recommit the case to the auditor with instruction to report all the evidence upon which he based that finding. The defendant contended that there was no evidence on which such a finding could be based as a matter of law, and that, if the report were allowed to stand without showing the facts upon which the finding was made, this finding of the auditor might be used as evidence in the case

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before the jury when there was absolutely no fact, which, as a matter of law, would be sufficient to support the finding, and thus the auditor would in effect be given the power to create evidence without any facts to support it. The court refused this motion to recommit and the defendant excepted, and being aggrieved, prays that his exceptions may be allowed."

Later the case was tried before *Crosby*, J. The auditor's report was put in evidence, subject to the exception which is stated later. In his report the auditor found that the amount of work and materials furnished by the plaintiff was worth the sum of $481 over and above the amount which the defendant already had paid. The evidence introduced at the trial showed that the plaintiff entered into a contract in writing with the defendant, whereby he agreed to do certain remodelling and make certain additions to two houses in South Boston "to the perfect satisfaction of the owner" for the sum of $5,777, to be paid in five instalments; that the sum of $1,119 was paid by the defendant, namely, on May 11, $250, on May 18, $250, and on May 25, $619.

The plaintiff testified that a few days after the contract was made he went to the defendant and stated that a certain person who had agreed to furnish him with money had become ill and could not be approached on business matters at that time, and that it would be very hard for him to keep on with the contract on that account; that the defendant asked whether the plaintiff had not any money himself, and the plaintiff said that he had about $600; that the defendant told him to use that $600 and that the defendant would see whether he could help him out by changing the payments on the contract, and asked how much the plaintiff would want every week, and that the plaintiff told him about $300; that the defendant said that that was a good deal of money and asked whether the plaintiff could not get along with less, to which the plaintiff answered that he could get along perhaps with $250 a week; that then the defendant said that he was sorry that the plaintiff bothered him in that way, but said that he would change the contract so far as the payments were concerned and would pay the plaintiff $250 per week, provided the payments thus made did not exceed the amount of the next instalment required under the contract; that the plaintiff

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thanked the defendant for changing the contract in his favor in that way, and that the defendant said that it was all right. The plaintiff, on cross-examination, further testified that he did not state that he was going to give up the job; that he "simply told him his tale of woe"; and that the defendant said he would advance the money earlier than provided for in the contract.

The defendant denied that he agreed to pay the plaintiff any amount except as provided for in the written contract, but testified that he did state that he would see what could be done in getting money from his mortgagee, and that as a matter of fact he did make two payments to the plaintiff of $250 each, one being made on the eleventh day of May and the other on the eighteenth day of May, but he denied that there was any agreement to change the contract.

The plaintiff further testified that on June 7 he went to see the defendant about a quantity of old plastering that was taken off the building, and talked to the defendant about his taking off the plastering and causing more work on the contract, and also asked him for an instalment of money, $250, due according to the agreement; that the defendant said he would not pay any more money; that, when the plaintiff said it was agreed between them that he should do so, the defendant said he was not going to make any further payments on that agreement; that in response to the plaintiff's statement about plastering the defendant said he did not care, that he would have the plastering done to suit him; that the plaintiff told the defendant that his estimate for plastering was $700; that he had received an estimate from a plasterer for $798; that a plasterer who went through the buildings that morning with the plaintiff gave an estimate for the plastering required to be done of $1,100; that the plaintiff's men had reported that they had seen the defendant remove plastering, and that the defendant said that he was going to have the plastering done to suit him; that the plaintiff said that "any man could do no different than quit under those circumstances"; that this talk was in the defendant's barn; and that after this talk the plaintiff went over to the house which was being remodelled; that the defendant soon after came over and the plaintiff asked him whether he was going to live up to his con-

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tract and pay the money due that day; that the defendant said "No"; that the plaintiff said that under the circumstances all he could do was to quit, and that the defendant said "Quit and be damned"; that thereupon he did quit and brought this action.

The defendant contended that the only conversation was to the effect that the plaintiff demanded the money and he denied any obligation to pay; that thereupon the plaintiff said that he should quit if the money was not paid; and that the defendant replied that he did not see that he could help it if he did, but informed him that he did so at his peril and forbade him to remove any of the stock.

There was a great deal of conflicting testimony as to various acts of the plaintiff and the defendant, and as to the amount of work done, its character and value.

The report of the auditor was admitted in evidence subject to the defendant's exception to the admission of the following sentence in the report: "A dispute arose between the parties, the result of which was a discontinuing by the plaintiff, with the knowledge and sanction of the defendant, of further service under the contract, and I find that the contract was annulled by the mutual action of the parties."

At the close of the evidence, the defendant asked the judge to rule that the plaintiff was not entitled to recover and also asked for many other rulings. The judge refused to make these rulings, and, among other instructions, gave the following:

"If you find that the parties agreed that the contract should be given up, or if you should find that the plaintiff was prevented from completing it through no fault on his part, but through the fault of the defendant Kells, then you would come to the question as to whether the plaintiff is entitled to recover anything for the labor and materials furnished. And as bearing upon this question, as to whether there was an abandonment of the contract on the part of the plaintiff, I instruct you that no act of the defendant which did not go to the extent of stopping the plaintiff in his work, or wrongfully interfering with the progress of the work, can be considered as a breach of the contract.

"Under the terms of this contract, as you will notice, it is provided that the defendant, Kells, the owner, was to be the judge whether the work was properly done or not; that is, the contract

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says that the work was to be done to the perfect satisfaction of the owner. And the question is, what does that mean? I instruct you, gentlemen, that that does not mean that the defendant has a right to say, under all circumstances, that the work is not satisfactory to him and therefore he will not pay for it. That is not the interpretation which the law puts upon words of that character in contracts of this kind. That means this: That the work must be satisfactory, and the materials must be satisfactory, to the owner, but the owner must act as a reasonable man under the circumstances; and if the work and materials are of such character as a reasonable man ought to be satisfied with, then the plaintiff has performed his duty in that respect.

"With reference to this matter of the annulment of the contract, if the contract was annulled by the parties, it must appear that either by their acts or conduct or words, or both, both parties agreed that the contract should be so annulled.

"So in this case, gentlemen, you will determine whether or not the plaintiff was justified in giving up the contract, or whether it was agreed between him and the defendant that it should be given up; and if so, then you will say what, if anything, were this labor and these materials worth over and above what was paid to the plaintiff."

The judge also instructed the jury as to the effect of an auditor's report and as to damages, and to the instructions on these matters neither party excepted.

The jury returned a verdict for the plaintiff in the sum of $946; and the defendant alleged exceptions.

O. Storer, (*A. G. Tibbetts* with him,) for the defendant.

C. H. Donahue, for the plaintiff.

SHELDON, J. 1. The defendant's motion for the recommital of the auditor's report with the instruction to the auditor to report all the evidence upon which was based the finding that the special contract had been annulled by the parties was addressed solely to the discretion of the presiding judge, and the defendant had no right of exception to the denial of the motion. This has been so often declared that we cite only a few of the later cases. *Butterworth* v. *Western Assurance Co.* 132 Mass. 489. *Carew* v. *Stubbs*, 161 Mass. 294. *Craig* v. *French*, 181 Mass. 282. *Tripp* v. *Macomber*, 187 Mass. 109, 110. *Allwright* v.

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Skillings, 188 Mass. 538. No doubt it would be a proper exercise of judicial discretion to recommit a report if it appeared that the auditor had made an erroneous ruling which would be likely to deprive a party of important rights. But ordinarily the opportunity given to try a case fully before a jury and thus to raise all questions of law, with the fact that the auditor's findings are not conclusive, will enable both parties to safeguard their rights on all material questions. The mere fact that an auditor may have erred on some abstract questions of law would not make it necessary to recommit his report.

But upon these exceptions, as in *Hunneman* v. *Phelps*, 199 Mass. 15, even if we had authority to review the discretion of the judge below, we have not the means of doing so. We do not know what facts, if any, were shown or agreed to before him; we could not say that his action was wrong upon the face of the report, and nothing else is before us.

2. Under the clear and distinct instructions given them, the jury must have found that the written contract between the parties was no longer in force; that either the defendant had prevented the plaintiff from performing that contract and so the latter had a right to treat it as no longer binding (*Bailey* v. *Marden*, 193 Mass. 277; *Posner* v. *Seder*, 184 Mass. 331, 333; *Brown* v. *Woodbury*, 183 Mass. 279), or else that it had been annulled by the consent of both parties. But the defendant contends that such a finding was unwarranted upon either ground.

The auditor found and reported that the contract had been annulled by the parties. This furnished *prima facie* evidence in favor of that contention. *Fisher* v. *Doe*, 204 Mass. 34, 39, 40. The jury had a right so to find. And the plaintiff's testimony indicated that his proposition to abandon the work had been assented to by the defendant. *Nickerson* v. *Weld*, 204 Mass. 346, 357. An assent would be sufficient though given angrily and with an oath. This too was for the jury.

But the verdict may have been based merely upon the ground that the plaintiff was not at fault for not having completed his contract, but was prevented from doing so by the wrongful conduct of the defendant. Was such a finding warranted?

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The plaintiff contends that the defendant on June 7 wrongfully refused to make a payment which he was then under obligation to make, and without which, as the defendant knew, the plaintiff could not go on with the work. This payment was not due under the terms of the original contract. But the plaintiff contended and testified that shortly after the contract was made he told the defendant that he, the plaintiff, had been disappointed in obtaining some money to use upon the work, and that it would be very hard for him to keep on with the contract; and that an oral agreement was then made between the parties, changing the terms of the written contract as to the payments to be made by the defendant, so that the defendant should pay to the plaintiff the sum of $250 per week, if the payments thus to be made did not exceed the next instalment fixed by the contract. The defendant denied this assertion; the plaintiff's testimony was somewhat weakened on cross-examination, and the auditor's report did not fully sustain the contention; but the question was for the jury. They could find that the modification was made, and that it was made in consequence of the plaintiff's statement to the defendant, which was understood by both parties to be in substance a statement that the plaintiff could not go on with his work and must and would abandon the contract unless it was modified. This makes it necessary under our decisions to say that the modification had, or could be found to have had, a good consideration, and that it was valid. *Munroe* v. *Perkins*, 9 Pick. 298. *Holmes* v. *Doane*, 9 Cush. 135. *Peck* v. *Requa*, 13 Gray, 407. *Hastings* v. *Lovejoy*, 140 Mass. 261, 264. *Earnshaw* v. *Whittemore*, 194 Mass. 187. *Hanson & Parker* v. *Wittenberg*, 205 Mass. 319, 324. *Parrot* v. *Mexican Central Railway*, *ante*, 184.

It follows that the jury could find that the defendant did unjustifiably prevent the plaintiff from going on with his work under the written contract. They could find that the defendant's refusal to make the payment due on June 7, or any future payments under the modified agreement, was not justified by the disputes that had arisen about plastering or the excavations to be made, or by the contention that the plaintiff's work had not been done to the defendant's "perfect satisfaction."

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These words are no stronger than the expression "entire satisfaction," which was considered in *Handy* v. *Bliss*, 204 Mass. 513. The instructions given conformed to the rule laid down in that case, and were correct.

These considerations make most of the defendant's requests for instructions immaterial. So far as necessary, they are covered by what has been said.

Exceptions overruled.

SACO BRICK COMPANY *vs.* J. P. EUSTIS MANUFACTURING COMPANY.

Suffolk. November 11, 1910. — January 4, 1911.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Res Judicata. Pleading, Civil, Declaration, Demurrer. *Contract*, Construction, Performance and breach.

The decision made in the suit in equity *J. P. Eustis Manuf. Co.* v. *Saco Brick Co.* 198 Mass. 212, 201 Mass. 391, that the contract on which that suit was founded was made by the Saco Brick Company with the J. P. Eustis Manufacturing Company and not with the Bruce-Merriam-Abbott Company, here was affirmed and was held to be conclusive between the parties.

Under R. L. c. 173, § 6, cl. 2, requiring that a declaration in a personal action "shall state concisely and with substantial certainty the substantive facts necessary to constitute the cause of action," the declaration upon a contract in writing need not set out all the details contained in the contract.

A declaration alleged that the plaintiff and the defendant entered into a contract in writing, of which a copy was annexed, whereby the defendant agreed to sell to the plaintiff a gas engine and the plaintiff agreed to pay therefor $1,750, that the defendant delivered a certain engine to the plaintiff and that the plaintiff paid the defendant therefor $1,750, but that the defendant "failed to comply with the contract in the following particulars." Here followed allegations as to the breaches complained of, and the declaration concluded with averments in regard to the damages sustained by the plaintiff. On demurrer, it was *held*, that this declaration set forth a cause of action clearly and properly stated.

Under R. L. c. 173, § 6, cl. 4, the declaration in an action of contract can include allegations of any number of breaches in one count, and the plaintiff is not confined to one form of statement in regard to any particular breach alleged.

In considering a demurrer to the declaration in an action of contract, it was *said*, that, if, according to the true construction of the contract, breaches were assigned improperly, the defective allegations could be demurred to specifically without demurring to the declaration as a whole; but in the present case no such ground of demurrer was alleged.

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In a suit in equity by a manufacturing company against a brick company, the plaintiff sought to enjoin the defendant from proceeding with an action at law for the breach of a contract in writing for the sale by the manufacturing company to the brick company of a gasoline engine, the manufacturing company alleging that it signed the contract in its own name by mistake and that it signed only as the agent of a third corporation. A decree was made dismissing the bill on the ground that the contract sought to be reformed was made and was intended to be made between the manufacturing company and the brick company and not between the third corporation and the brick company. In the action at law by the brick company against the manufacturing company, thus unsuccessfully sought to be enjoined, the manufacturing company as defendant set up the equitable defense that the contract with the plaintiff was made not by it but by the third corporation for which the defendant was acting as agent. The plaintiff filed no replication to the alleged equitable defense, but the presiding judge ruled that the decree in the suit in equity was a bar to the alleged equitable defense, and no objection was made by the defendant that the plaintiff had not filed a replication of *res judicata*. *Held*, that, while the plaintiff might have pleaded the decree in the suit in equity in a replication of *res judicata*, yet, as no objection had been taken to its failure to do so, this court would regard the question as properly before them, and that the ruling of the judge was right, the fact, that the action at law in which the equitable defense was attempted to be set up was begun before the suit in which the decree was made, being no reason why the decree, which settled the question of fact conclusively between the parties, should not operate as a bar.

A contract for the purchase and sale of a gas engine contained an agreement on the part of the seller that the engine should be of the capacity of fifty-five horse power with an overload of ten per cent. In an action by the buyer against the seller for an alleged breach of the contract in supplying an engine of less power than required by the contract, it appeared that the engine delivered to the plaintiff had a gasoline attachment and was designed for use either with natural gas for fuel or arranged, as this one was, with gasoline fuel. It appeared that an engine which would develop fifty-five horse power and a ten per cent overload with natural or illuminating gas would develop much less power with gasoline. The contract provided that the engine should be "arranged for gasoline fuel," and no other fuel was referred to in the contract. It was testified without objection and recited in the bill of exceptions that "the only fuel contemplated by the parties to be used by the plaintiff in the operation of the engine was gasoline." *Held*, that the contract was not for a gas engine of fifty-five horse power warranted to develop an overload of ten per cent, but for a gas engine that would develop fifty-five horse power and an overload of ten per cent with gasoline fuel, and that a ruling to that effect was correct.

In an action for the alleged breach of a contract by which the defendant agreed to furnish the plaintiff with an engine which would develop with gasoline fuel a stipulated horse power, the defendant contended that the reason that the engine did not furnish the horse power stipulated in the contract was that the plaintiff failed to build the foundation for the engine in the manner specified in a certain blue print. There was no evidence and no contention that the plaintiff had not acted in good faith in building the foundation which he furnished. The defendant asked the presiding judge to rule that the fact that the plaintiff did not build such a foundation as the contract called for prevented his recovery in the action. The judge refused to give this ruling, and instead of it instructed the jury that, if the foundation furnished by the plaintiff "was just as good as that

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specified in the blue print," a failure of the foundation to accord with the specifications was not a defense to the action. *Held*, that, assuming in favor of the defendant that the blue print and the foundation plan constituted a part of the contract and that it was intended and expected by the defendant that the foundation should be built by the plaintiff as therein specified, yet the building by the plaintiff of the foundation specified in the blue print was not a condition precedent to the defendant's undertaking that the engine when placed upon it and properly connected should develop with gasoline fuel the stipulated horse power, and that the instruction of the judge was at the least sufficiently favorable to the defendant.

MORTON, J. This is an action to recover for certain alleged breaches of a written contract entered into between the defendant and the plaintiff for the sale and purchase of a gas engine. The defendant demurred to the declaration. The demurrer was overruled and the defendant appealed. The case came on for trial upon the merits and there was a verdict for the plaintiff. The case is here on the appeal from the order overruling the demurrer and on exceptions by the defendant to certain rulings and refusals to rule by the presiding justice at the trial on the merits.*

1. We think that the demurrer was rightly overruled. The grounds of demurrer relied on are that the declaration does not state concisely and with substantial certainty the substantive facts necessary to constitute the cause of action as required by R. L. c. 173, § 6, cl. 2, and that the contract contained in the written agreement was a contract not with the defendant company but with the Bruce-Merriam-Abbott Company, for which the defendant company was acting as agent.

As to the second ground relied on it is disposed of, we think, by the case between the same parties, the defendant here being plaintiff there, reported in 198 Mass. 212, and 201 Mass. 391. It was expressly held in the first case that the Eustis Manufacturing Company was liable as a party to the contract, and when the case was before this court again in 201 Mass. 391, it was pointed out that there were provisions in the contract inconsistent with liability on the part of the Bruce-Merriam-Abbott Company, and it was held that the decree dismissing the bill was well warranted on that and other grounds. The contention

* The demurrer was heard and overruled by *Fox*, J. The trial was before *Aiken*, C. J.

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of the Eustis Manufacturing Company that the contract was with the Bruce-Merriam-Abbott Company and not with it must therefore be regarded as having been settled against it.

In regard to the other ground of demurrer it is to be observed that the statute does not require that in an action upon a written contract all the details contained in the contract shall be set out, but only that the substantive facts necessary to constitute the cause of action shall be stated, and that those shall be stated concisely and with substantial certainty. In the present case the declaration alleges that the plaintiff and defendant entered into a written contract of which a copy is annexed, whereby the defendant agreed to sell to the plaintiff a gas engine, and the plaintiff agreed to pay therefor $1,750; that the defendant delivered a certain engine to the plaintiff and the plaintiff paid the defendant therefor the sum of $1,750, but that the defendant "failed to comply with the contract in the following particulars." Then follow allegations as to the breaches complained of, and the declaration concludes with averments in regard to the damages sustained by the plaintiff. The cause of action is clearly stated and the breaches relied on are distinctly set forth. According to the express terms of the statute the plaintiff could include any number of breaches in the same count (R. L. c. 173, § 6, cl. 4), and it was not confined to one form of statement in regard to any particular breach alleged, but could state it in the alternative in different ways. If, according to the true construction of the contract, breaches were improperly assigned, they could be demurred to specifically without demurring to the declaration as a whole. *Montague* v. *Boston & Fairhaven Iron Works*, 97 Mass. 502. No such ground of demurrer was, however, alleged.

2. In its answer the defendant set up by way of equitable defense that it was intended and understood by and between the plaintiff and the defendant that the contract should be and was between the plaintiff and the Bruce-Merriam-Abbott Company, and that the contract ought not in equity to be enforced against the defendant. The first exception taken by the defendant at the trial was to a ruling made by the presiding judge at the request of the plaintiff that "The equitable defense was *res adjudicata;* and that it was not open to the defendant in this

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action, and that no evidence should be introduced in support of it." We think that the ruling was right. The ground now set up by way of equitable defense to the present action was that on which equitable relief was sought by the defendant in the suit already referred to and the decree in that case which was against the defendant must be regarded as disposing once for all of the contention, whether made the ground of affirmative or defensive relief or advanced at law or in equity. The remedy was concurrent at law and in equity, but having elected to pursue the remedy in equity the defendant is bound by its election. *New York, New Haven, & Hartford Railroad* v. *Martin*, 158 Mass. 313, 315. *Nash* v. *D'Arcy*, 183 Mass. 30, 31. The fact that this action was begun before the suit reported in 198 Mass. 212, and 201 Mass. 391, did not prevent the plaintiff from setting up the judgment in that case as a bar to the equitable defense which the defendant sought to introduce in this case. The judgment could have been pleaded by the plaintiff by way of replication to so much of the defendant's answer as sets up the equitable defense. R. L. c. 173, § 33. See *Goodrich* v. *Bodurtha*, 6 Gray, 323. No objection was taken because it was not so pleaded, and it must be regarded therefore as having been properly before the court for the court to rule upon.

The next exception was to a ruling of the judge that "The contract requires the engine to be of the capacity of fifty-five horse power with an overload of ten per cent when operated by gasoline." We think that this ruling also was right. The contract provided that the defendant should "furnish and deliver F. O. B. cars Cleveland . . . one 55 H. P. Twin Cylinder vertical Gas Engine . . . same arranged for gasoline fuel, and to have air starting outfit." It also provided that "The engine shall be tested at our works and develop 55 actual brake H. P." The contract also contained the following guarantees on the part of the defendant, namely: "We will guarantee the engine to develop a 10% overload. Also guarantee the engine to operate between no load and full load without more than 2% variation in speed," and there was on the back of the blue print that was furnished by the defendant to the plaintiff the indorsement "55 H. P. Gasoline." "There was evidence tending to show that the engine in question, with a gasoline attachment was

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manufactured in Cleveland . . . and was shipped from there to and received by the plaintiff at Saco. . . . That it was designed for use with natural gas as a fuel, or, if arranged for, as it was, with gasoline fuel." It appeared "that an engine which would develop 55 H. P. and a 10 per cent overload with natural or illuminating gas would develop much less power with gasoline." "The only fuel contemplated by the parties to be used by the plaintiff" as the exceptions recite, "in the operation of the engine was gasoline." It is plain, we think, not only from the contract itself but also when interpreted in the light of the conduct of the parties, that what the parties were contracting for was an engine which should develop fifty-five horse power and an overload of ten per cent when operated with gasoline as a fuel. The contract expressly provides that the engine shall be "arranged for gasoline fuel." That is the only fuel referred to in the contract, and the natural construction and meaning is that the engine was intended to develop the specified horse power and overload with that fuel. There is nothing to show that the power for which it was to be tested was anything except power which would be created by the use of gasoline as a fuel. The fact, which was testified to without objection, that the only fuel contemplated by the parties was gasoline, also tends to show that the construction which we have given to the contract is the correct one. The contract was not for a gas engine of fifty-five horse power warranted to develop an overload of ten per cent, but for a gas engine that would develop fifty-five horse power and an overload of ten per cent with gasoline for fuel.

The third and last exception was to the refusal of the judge to rule as requested by the defendant that "The fact that the plaintiff did not build such a foundation as the contract calls for prevents any recovery in this action." Instead of the ruling thus requested the judge instructed the jury that "If the foundation furnished by the Brick Co." (the plaintiff) "was just as good as that specified in the blue print, the failure of the foundation to accord with the specification is not a defense in this action. If however the failure to build the foundation in the manner the blue print specified . . . was the reason why the engine did not furnish the horse power stipulated in the contract, the Brick Co." (the plaintiff) "cannot recover damages in this case." We

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think that these instructions were sufficiently favorable to the defendant. We assume in favor of the defendant that the blue print and the foundation plan constituted a part of the contract, and that it was intended and expected by the defendant that the foundation should be built by the plaintiff as therein specified. But the building by the plaintiff of the foundation as specified in the blue print was not a condition precedent to the defendant's undertaking that the engine when placed upon it and properly connected should develop with gasoline fuel the stipulated horse power. If the engine did not develop the power called for, the defendant had a right to show, if it could, that the failure was due in whole or in part to the manner in which the foundation had been constructed, and to have the case decided accordingly. But, there being nothing to show and no claim being made that the plaintiff did not act in entire good faith in building the foundation as it did, it would have been error to instruct the jury as requested that if the plaintiff did not build the foundation as specified it could not recover. Under the instructions of the judge the jury could find for the plaintiff only in case they found that the foundation built by the plaintiff was "just as good as that specified in the blue print." As already observed, this was to say the least sufficiently favorable to the defendant.

Order overruling demurrer affirmed; exceptions overruled.

G. C. Abbott, for the defendant.

F. L. Norton, for the plaintiff.

EDWARD J. VICKERY *vs.* JOHN RITCHIE, JR.

Suffolk. November 11, 1910. — January 4, 1911.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Contract. Payment. Bills and Notes. Damages.

Vickery v. *Ritchie*, 202 Mass. 247, affirmed.

In an action by a builder against a landowner for the value of labor and materials furnished by the plaintiff in the construction of a building on the defendant's land at his request, it appeared that the plaintiff and the defendant, being deceived by a fraudulent architect, supposed until the building was completed that they had made a contract for its construction, that the architect fraudulently had procured and delivered to the plaintiff and to the defendant what purported

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to be duplicate originals of a contract for the construction of the building, that in the instrument held by the plaintiff the price was stated to be $33,000 and in that held by the defendant it was stated to be $23,000, that thereafter the architect volunteered to give and gave to the plaintiff certain promissory notes, signed by the architect, on account of sums apparently due under the instrument held by the plaintiff which stated the larger price, at a time when nothing was due under the terms of the instrument held by the defendant which stated the smaller price, that all the dealings of the parties pertaining to the contract were through the architect and that the plaintiff and the defendant never met, that when the notes were received by the plaintiff from the architect the plaintiff supposed that they were to be applied in part payment of the price named in the instrument held by him, but that afterwards by direction of the architect he applied the notes upon a contract between him and a third person, which was in charge of the architect and on which the plaintiff was entitled to payments, that the architect had no authority from the defendant to make these payments, and that the defendant had no knowledge of the giving of the notes until after they had been applied by direction of the architect upon the contract with the third person. There was no evidence that the defendant ever ratified the giving of the notes as payments made in his behalf, and on the contrary it appeared that the defendant repudiated all liability, at any time, for any sum beyond the amounts paid by himself. The defendant asked for instructions to the jury that he should be credited with the amount of the notes, and that, the notes having once been applied as payments upon a contract purporting to have been made in his behalf, their application could not be changed. The presiding judge refused to give such instructions, and, having stated that the receipt of a note upon a debt was *prima facie* to be deemed a payment, he left it for the jury to say whether the ordinary presumption in the case of a payment by one who ought to pay was overcome by the facts in this case. *Held*, that the rulings of the judge were sufficiently favorable to the defendant.

In an action by a builder against a landowner for the value of labor and materials furnished by the plaintiff in the construction of a building on the defendant's land at his request, it appeared that the plaintiff and the defendant, being deceived by a fraudulent architect, supposed until the building was completed that they had made a contract for its construction, that the architect fraudulently had procured and delivered to the plaintiff and to the defendant what purported to be duplicate originals of a contract for the construction of the building, that in the instrument held by the plaintiff the price was stated to be $33,000 and in that held by the defendant it was stated to be $23,000. The defendant asked for a ruling that the defendant was "entitled to a credit of $1,600 for late completion," founding this claim upon a provision of the supposed contract that the plaintiff should pay $10 a day for all time after the date at which the contract was to be completed until it was in fact completed. *Held*, that there was no foundation for the defendant's claim of this credit, as no contract containing the provision relied upon ever took effect between the parties, and that the only question to be determined was the value of the labor and materials furnished by the plaintiff at the time when and the place where they passed to the ownership of the defendant.

CONTRACT for a balance of $10,467.16 alleged to be due for the erection of a Turkish bath house upon land of the defendant

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on Carver Street in Boston, with a count upon an alleged contract in writing and another count upon an account annexed. Writ dated January 9, 1904.

In the Superior Court the case first was tried before *Pierce*, J., who at the close of the plaintiff's evidence ordered a verdict for the defendant. The plaintiff alleged exceptions, which were sustained by this court in a decision, reported in 202 Mass. 247, holding that there was no express contract between the parties because their minds never met, but that the plaintiff was entitled to recover upon a *quantum meruit* the fair value of the labor and materials which he had furnished to the defendant at his request.

There was a new trial of the case before *Hardy*, J. The important facts which appeared by the evidence are stated briefly in the opinion, and are stated more fully in the report of the case at its previous stage above referred to. At the close of the evidence the defendant asked for eleven instructions to the jury relating to the four subjects, which, as classified in the defendant's brief, are stated in the opinion.

Among the instructions requested by the defendant and refused by the judge were the following, which are referred to in the opinion:

"3. If notes are received and properly applied in satisfaction of a debt, the application of them cannot be subsequently changed so as to revive the debt without the assent of the debtor, either express or implied, given by himself or some one authorized to represent him.

"4. If the plaintiff received from Dwight [the fraudulent architect mentioned in the opinion] notes which have been paid, and applied these properly to the amount due from the defendant, this application could not subsequently be changed without the assent, express or implied, of the defendant or some one authorized to represent him.

"5. The notes amounting to $3,000 received by the plaintiff and applied to the defendant's account amounted to a payment to that extent even if Dwight subsequently directed that they be applied to some other account, provided this direction was given without the authority or consent of the defendant."

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"8. The $3,000 in notes became a payment to that extent on account of this job.

"9. The three notes of $500 each became a payment of $1,500 on account of this job.

"10. The defendant is entitled to a credit of at least $1,600 for late completion."

The judge submitted the case to the jury with instructions, of which such parts as are necessary to understand the questions raised by the exceptions are quoted or described in the opinion. The jury returned a verdict for the plaintiff in the sum of $11,431.55; and the defendant alleged exceptions.

E. F. McClennen, for the defendant.

R. W. Light, for the plaintiff.

KNOWLTON, C. J. This case was before this court after its first trial, and was reported in 202 Mass. 247, where the principal facts are stated. It is now presented on the defendant's exceptions, which, as he says in his brief, relate to four subjects, namely: "First, the right of the plaintiff to recover; second, the right of the defendant to a credit of $3,000, the amount of certain notes given in payment and subsequently paid; third, the right of the defendant to a credit of $1,500 for certain other notes given in payment and subsequently dishonored; fourth, the right of the defendant to a credit of $1,600 as liquidated damages for the delay from March 6, 1903, to August 13, 1903, at $10 a day."

The right of the plaintiff to recover upon the facts found by the jury was established, upon full consideration, by our former decision, and the defendant's requests for instructions on this part of the case were rightly refused.

The various requests upon the second and third subjects to which the defendant's argument was addressed were rightly refused.

The evidence to which the requests related was that the architect fraudulently delivered to the owner and contractor what purported to be duplicate contracts signed by the parties, for the construction of a bath house, in which the price to be paid was stated as $33,721 in the copy delivered to the contractor, and as $23,200 in the copy delivered to the owner, and afterwards volunteered to give the contractor certain notes, signed by himself,

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on account of sums apparently due under the contract held by him which stated the larger price, at a time when there was nothing due according to the terms of the contract held by the owner which stated the smaller price. All the dealings of the parties pertaining to the contract, from first to last, until the building was substantially completed, were through the architect. The plaintiff and the defendant never met. When these notes were received by the plaintiff from the architect the plaintiff supposed that they were to be applied in part payment of the price stated in his contract. Upon all the evidence the architect had no authority to make these payments or any of them for the defendant, and the defendant had no knowledge of them until long afterwards, when they had been applied by direction of the architect upon a contract with one Richardson, in his charge, on which the plaintiff was entitled to receive payments. There is no evidence that the defendant ever ratified the giving of these notes by the architect for the purposes for which they were given; but on the contrary, he repudiated all liability, at any time, for any sum beyond the amounts paid by himself. Upon this evidence the judge correctly stated the law, that the receipt of a note upon a debt is *prima facie* to be deemed a payment; but he left it to the jury to say whether the ordinary presumption in the case of a payment by one who ought to pay was overcome by the facts in this case, where the notes were given by a volunteer, whose acts in this particular could have no effect upon the rights of the defendant, and were received by one who supposed they were to be applied on an express contract to pay him $33,721, when in fact there was no such contract. Under these circumstances, the jury were not bound to find that the notes were to be taken as a payment upon the account upon a *quantum meruit* for labor and materials. The judge could not give the last part of the second request, that there was "no evidence tending to control this presumption in the present case." The third and fourth requests were not applicable to the case of a payment by a volunteer without knowledge of the defendant, and to a second application made before the debtor had any knowledge of the payment.

The fifth, eighth and ninth requests on this subject called for an erroneous statement of the law. The judge told the jury that

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they had a "right to consider what were the further relations between Dwight and the plaintiff as to the change of the notes, that is, applying them on another account," and said he ruled against the defendant on the proposition maintained by him that, "as long as there was some application of these notes to the payment of his account, they could not afterwards change the application to the Richardson account." Upon the evidence, this ruling and the submission of these questions to the jury were sufficiently favorable to the defendant.

The next subject to which the defendant's argument relates arises under the tenth request for a ruling, that "the defendant is entitled to a credit of at least $1,600 for late completion." This is founded upon a provision in the supposed contract that the plaintiff should pay $10 per day for all time after the date at which the contract was to be completed until it was in fact completed. This contract never took effect between the parties, and there was no foundation for the defendant's claim of this credit. The real question was what was the value of the labor and materials furnished by the plaintiff at the time and place when and where they passed to the ownership of the defendant. The instruction to the jury that they should allow to the defendant $10 for each day of unreasonable delay of the plaintiff, if they found that there had been unreasonable delay and no waiver on the part of the defendant, was too favorable to him.

Exceptions overruled.

WILLIAM E. NEAL, receiver, *vs.* JOHN F. SCHERBER & another.

Suffolk. November 14, 1910. — January 4, 1911.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Practice, Civil, Exceptions. *Bills and Notes. Contract*, Consideration. *Words*, "Appeared."

A statement in a bill of exceptions that certain facts "appeared from the evidence" means that these facts are undisputed or admitted.

Where a bank takes a promissory note from the last indorser thereof, for whose accommodation the maker and a previous indorser have signed it, and surren-

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ders in exchange a previous note then due made and indorsed by the same persons, the fact that the bank knew at the time of the transaction that the maker and the previous indorser became parties to the note for the accommodation of the last indorser does not affect its right to hold them, and between them and the bank there is a good consideration for their agreement, whatever may be the case between them and the last indorser.

CONTRACT, brought by the receiver of the property of the American National Bank against John F. Scherber as the maker and Mary White as the indorser of a promissory note for $250 dated June 27, 1905, and payable on September 27, 1905, to the American National Bank at any bank in Boston. Writ in the Municipal Court of the City of Boston dated March 23, 1907.

On appeal to the Superior Court the case was tried before *Crosby*, J., who ordered a verdict for the plaintiff; and the defendants alleged exceptions.

In the bill of exceptions the first paragraph stating the facts in the case began with the phrase "It appeared from the evidence," the second and third paragraphs each began with the phrase "It further appeared from the evidence," and the fourth and fifth paragraphs, which completed the statement of the facts, each began with the phrase "It further appeared." From the facts so stated it appeared that the last indorser of the note was William A. Carrie, who signed as "William A. Carrie & Co.," a name under which he then was doing business. The second and fifth paragraphs of the statement of the facts in the bill of exceptions were as follows:

"2. It further appeared from the evidence that a few days before June 27, 1905, the said Carrie took the note to the defendant Scherber to sign and also to procure the signature of the defendant White, and that said Scherber did sign the note, procured the indorsement of defendant White, and then returned the note to Carrie. Mr. Carrie then delivered the same to the American National Bank, paid $50 in cash, and received in exchange therefor another note for $300, made and indorsed by the same parties, which fell due that day (June 27, 1905). There had been several similar notes given prior to the one in suit, of which this was the last."

"5. And it further appeared that neither of the said defendants received any money or other consideration from the bank for signing or indorsing any of said notes. And the officials

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of the bank knew that there was no consideration received by either of said defendants from the bank for signing or indorsing either the note of June, 1904, or any of the subsequent notes."

The case was submitted on briefs.

C. F. Spear, for the defendants.

D. T. Montague, W. Keyes & M. E. Sturtevant, for the plaintiff.

SHELDON, J. All the facts necessary to make out the plaintiff's *prima facie* case were conceded at the trial. We must construe the statement of the bill of exceptions that these facts "appeared from the evidence" to mean that they were undisputed, or in other words that they were admitted.

That the defendants became parties to the note for the accommodation of Carrie and that this was known to the bank would not affect its right to hold them. As between them and the bank there was ample consideration for their agreement, whatever may have been the case as between them and Carrie. R. L. c. 73, § 46. *Lowell* v. *Bickford*, 201 Mass. 543.

The verdict for the plaintiff was rightly ordered. The exceptions are frivolous and must be overruled with double costs and twelve per cent interest.

So ordered.

SARAH F. PAGE *vs.* INHABITANTS OF WEYMOUTH.

Suffolk. November 14, 1910. — January 4, 1911.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Way, Public, defect in highway. *Negligence*, Due care of plaintiff.

A hole or gully in an earth sidewalk of a much travelled street of a town, caused by a flow of water across the sidewalk, may be found to have been a defect in a public way, and, if it is shown that this condition of things had existed there for a long time and that the authorities of the town knew of its existence or would have known of it if they had exercised due care, the town may be found to be liable to a traveller injured by reason of this defect while in the exercise of due care.

If a traveller on a public way of a town is injured by reason of a defect therein, consisting of a hole in an earth sidewalk, the fact that he had passed over the hole before on the same day and knew of its existence does not as matter of law preclude him from recovering damages from the town, and, in an action

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under R. L. c. 51, § 18, for such damages, circumstances may be shown which entitle him to go to the jury on the question whether he was in the exercise of due care.

TORT under R. L. c. 51, § 18, for personal injuries alleged to have been sustained by reason of a defect in the sidewalk of Pond Street in that part of Weymouth called South Weymouth at about 6.15 P. M. on Sunday, October 7, 1906. Writ dated November 1, 1906.

In the Superior Court the case was tried before *Crosby*, J.

There was evidence that the plaintiff, a woman about fifty years of age, was walking along the west side of Pond Street from the railroad station toward a house where she was employed as a nurse; that she came to a place where there was a hole; that her foot went down, and it pitched her forward, "right down on my knees"; that the plaintiff had walked over the sidewalk that morning and knew that there was a place across the sidewalk that looked like a washout; that she did not see the place when she stepped into it, as it was dark, and that she was not thinking anything about it; that she was thinking about getting home, but that she was not walking any faster than she was accustomed to walk; that there were trees along the left hand side of the sidewalk, next to the street, and that there was a stone wall with a hedge rising above it on the right hand side; that branches of the trees overhung both the sidewalk and the street; that the hole was a washout six or seven inches deep and "wide enough to put your foot in." There was testimony tending to show that it had existed in the same condition for five or six months. The place of the accident was about one hundred yards from a light, and the lights were so placed between the trees as to throw no light at all except directly down to the ground. It was so dark at the place of the accident that "you could run into somebody before you saw them," and "you wouldn't notice the hole until you got up on to it." The superintendent of streets for the defendants testified that he had inspected the place of the accident two or three days before the accident occurred.

At the close of the evidence the defendant asked the judge to rule: (1) That "upon all the evidence the plaintiff is not shown to have been in the exercise of due care and the verdict must be for the defendant"; (2) that "upon all the evidence the defend-

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ant is not shown to have been negligent and the verdict must be for the defendant"; (3) that "upon all the evidence the verdict must be for the defendant"; and (4) that "if the jury find that the plaintiff upon the morning of the accident passed over the place and saw its defective condition and on returning at night walked along without paying any attention to it as she says she did, then she was not in the exercise of due care and the verdict must be for the defendant."

The judge refused to make any of these rulings, and submitted the case to the jury, who returned a verdict for the plaintiff in the sum of $3,700. The defendant alleged exceptions.

The case was submitted on briefs.

A. P. Worthen, for the defendant.

H. S. MacPherson, *W. H. Foster & J. B. Mahar*, for the plaintiff.

KNOWLTON, C. J. There is nothing in this case that calls for the consideration of any but very familiar rules of law, and the facts are simple. The jury properly might find that there was a defect in the earth sidewalk on a much travelled street, which was in the form of a hole or gully, caused by a flow of water across the walk; that this defect had existed there for a long time; and that the authorities of the town knew it, or would have known it if they had exercised due care.

It was a question for the jury whether the plaintiff, at the time of the accident, was using due care. The fact that she had passed over the hole before and knew of its existence does not, as a matter of law, preclude her from recovering. *Winship* v. *Boston*, 201 Mass. 273. *Campbell* v. *Boston*, 189 Mass. 7. *George* v. *Haverhill*, 110 Mass. 506.

Exceptions overruled.

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HARRY D. HALL & another *vs.* BOSTON PLATE AND WINDOW GLASS COMPANY.

Suffolk. November 14, 15, 1910. — January 4, 1911.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Assignment, Of wages.

Under St. 1906, c. 390, which provides that no assignment of future wages shall be binding upon the employer of the assignor until a copy of it and an accurate statement of the account between the assignor and the assignee have been delivered to the employer, if an employee makes an assignment of his wages to one who does not give notice thereof to the employer until after the employer has received the notice and the copies required by the statute from another who, at a later date than that of the assignment previously mentioned and without knowledge of it, had received from the assignor a like assignment, the earlier assignment is rendered invalid as against the subsequent assignment and the employer is justified in paying the assignor's wages to the second assignee during the time covered by the second assignment.

An employer who has been given the notice required by St. 1906, c. 390, § 2, of an assignment of his wages by an employee, is not bound to see to the appropriation of sums paid to the assignee in accordance with such assignment, and is justified in paying such wages to the assignee so long as the assignment continues in force in spite of the fact that, if all of the sums so paid were applied by the assignee toward payment of the debt to secure the payment of which the assignment was given, the debt would have been paid before the end of the period covered by the assignment.

CONTRACT for the amount of the wages earned by one Albert S. Does while he was in the employ of the defendant from June 25, 1909, to August 14, 1909, which were alleged to have been assigned to the plaintiff by an instrument dated August 17, 1908. Writ dated September 24, 1909.

In the Superior Court the case was heard by *Lawton*, J., without a jury, on an agreed statement of facts which authorized the court to draw inferences of fact therefrom.

The assignment to one George E. Hills, referred to in the opinion, was as follows:

"Know all men by these presents, That I Albert S. Does of Winthrop, in the County of Suffolk for a valuable consideration to me paid by George E. Hills of Boston in the County of Suffolk, and Commonwealth of Massachusetts, the receipt whereof I do hereby acknowledge, do hereby assign and transfer to said

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George E. Hills all claims and demands (which I now have, and all) which within a period of two years from the date hereof I may and shall have against my present employer, and against any person whose employ I shall hereafter enter, (for all sums of money due) for all sums of money and demands which, at any time within said period may and shall become due to me, for services as Clerk or otherwise. To have and to hold the same to the said George E. Hills, his executors, administrators and assigns, to secure a debt (1) of eight hundred and forty-four dollars (with interest thereon from date, at the rate of 5% per annum) for money actually furnished by the assignee amounting to $844. (2) Contracted simultaneously with the execution of this assignment. In witness whereof, I have set my hand this ninth day of January, 1909. Albert S. Does. Signed and delivered in presence of E. V. Morrison."

Other facts are stated in the opinion.

The presiding judge found for the defendant; and the plaintiff appealed.

L. A. Charlton, for the plaintiffs, submitted a brief.

G. E. Hills, for the defendant.

MORTON, J. This case was heard upon agreed facts with power to draw inferences. The judge found for the defendant and the plaintiffs appealed.

It appeared that one Does, who was in the employ of the defendant, made an assignment of his wages on August 17, 1908, to the plaintiffs for two years, to secure a debt of $217.50 due from him to them. No notice of the assignment was given by the plaintiffs to the defendant, as required by St. 1906, c. 390, until June 25, 1909, and the assignment was not recorded until August 2, 1909. On January 9, 1909, Does, who was still in the employ of the defendant, made another assignment of his wages, also for two years, to one Hills to secure a loan of $844 with interest at five per cent per annum. Hills had no notice of the prior assignment. He was informed by Does that there was no outstanding earlier assignment, and upon inquiry of the defendant was told that they had no notice of any. He also examined the records of the town of Winthrop, where Does lived, and found no assignment on record. Thereupon he made the loan and took the assignment aforesaid and caused it to be recorded

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in the town clerk's office of Winthrop on January 11, 1909, and on January 13, 1909, he gave notice of it to the defendant and did all the things required by St. 1906, c. 390, to make it binding on them. The defendant paid Hills each week, beginning on January 16, the wages due to Does until he left their employment August 14, 1909. On June 25, 1909, the day on which the plaintiffs gave notice to the defendant of their assignment, Does owed the plaintiffs $131.76, and that is the amount which they seek to recover of the defendant in this action. On September 9, 1909, they duly demanded of the defendant payment of the same. The plaintiffs make no claim to any of the wages of said Does accruing before June 25. On said June 25, and also at the date of the agreed facts the amount owed by Does to Hills largely exceeded the amount of the plaintiffs' claim. The wages of Does were $34.61 a week and were more than sufficient in amount, as stated in the plaintiffs' brief, to have paid the sum lent by Hills to Does to secure the payment of which the assignment was given by Does to Hills.

St. 1906, c. 390, is entitled "An Act relative to the assignment of wages," and by § 6, "All acts and parts of acts inconsistent herewith are hereby repealed." Section 1 provides that no assignment of future wages shall be valid for a period exceeding two years from the date thereof, nor unless certain specified requirements are complied with. Section 2 provides that no such assignment shall be valid unless a copy is delivered to the assignor by the assignee at the time of the execution of the assignment, and that it shall not be binding on the employer of the assignor until a copy of it and an account conforming to the requirements thereinafter stated shall have been delivered to the employer. The plain implication of what is required to be done in order to make the assignment binding on the employer is that if that is done the assignment shall be binding on the employer according to its terms. This is borne out by the provisions in § 5 that "An assignment of wages made in accordance with the provisions of this act shall bind all wages earned by the assignor within the period named in such assignment." The effect of the statute is, therefore, to render invalid as against a subsequent assignment where the requirements of the statute have been observed, a prior assignment where the requirements

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of the statute have not been observed. The matter being one of statutory regulation, cases like *Thayer* v. *Daniels*, 113 Mass. 129, on which the plaintiffs rely, which deal with conflicting assignments at common law, do not apply. It follows from the construction which we have given to the statute that the defendant was justified in paying over the wages to Hills after it received notice from the plaintiffs of their assignment. Upon its execution in accordance with the requirements of the statute the assignment to Hills operated to transfer to him the wages earned by Does, while in the employ of the defendant, during the time covered by the instrument. See *Citizens Loan Association* v. *Boston & Maine Railroad*, 196 Mass. 525. And so long as it continued in force the rights and obligations of the parties could not be affected by an invalid assignment previously made. Nor could validity be given to such invalid assignment as against one subsequently properly made, by attempting to comply later with the requirements of the statute. The rights of the parties were fixed once for all, so far as these proceedings are concerned, by the execution of a valid assignment to Hills.

The defendant was not bound to see to the appropriation of the wages paid to Hills by them. The only question is whether they were justified in paying them to Hills, and, as we have already said, we think that they were. Whether the plaintiffs have any remedy by means of a trustee process summoning Hills as trustee or otherwise to compel an accounting as between Hills and Does, it is not necessary now to consider.

Judgment affirmed.

HENRY C. SNOW & others *vs.* FREDERIC B. RICE & others, executors.

Suffolk. November 15, 1910. — January 4, 1911.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Landlord and Tenant, Tenant's liability for increased rent due to betterment tax. *Tax*, Betterment.

Under St. 1871, c. 382, § 9, which provided that, "when an assessment is made upon an estate, the whole or any portion of which is leased, the owner . . .

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shall pay the assessment, and may thereafter collect of the lessee an additional rent for the portion of the estate so leased," proportionately reckoned, which was codified into R. L. c. 50, § 8, with some verbal changes which did not affect its construction, no obligation on the part of the tenant comes into being until payment of the betterment is made by the owner, and the liability then becomes merely a future liability to be reckoned from that time, not a liability also for past time; and therefore if a betterment tax is assessed upon an estate under lease, and, by reason of a petition by the owner for an abatement thereof, which is finally compromised and settled, the payment of the tax is delayed until after the termination of the tenancy, the tenant is under no liability under the statute to pay to the owner any increase of rental.

CONTRACT, originally against William B. Rice, under R. L. c. 50, § 8, for additional rent alleged to be due because of a betterment assessment on a building of the plaintiffs, made during the occupancy thereof by the defendants' testator as a tenant, but not paid by the plaintiffs until after the termination of the tenancy. Writ in the Municipal Court of the City of Boston dated June 8, 1907.

William B. Rice died before the trial, and the defendants, who were executors of his will, were admitted to defend the action.

On appeal to the Superior Court the case was heard by *Hardy*, J., without a jury. The facts are stated in the opinion. The third ruling asked for by the defendants and referred to in the opinion was as follows: "3. The defendants are entitled to a finding in their favor on the third count of the declaration [which set out the plaintiffs' claim in full as stated in the opinion] as a matter of law."

The judge found for the defendants; and the plaintiffs alleged exceptions.

A. A. Ballantine, for the plaintiffs.

R. G. Dodge, for the defendants.

SHELDON, J. The plaintiffs, being the owners of an estate in Boston, leased a portion thereof to one Rice, the defendants' testator, for a term running from January 1, 1898, to April 1, 1906, and Rice's occupation continued for a month longer. On December 24, 1900, during Rice's tenancy and while he was in possession under his lease, a betterment assessment of $11,089.33 was duly levied upon the plaintiffs' estate. They did not then pay this assessment, but filed a petition in the Superior Court for its reduction or abatement. On December 7, 1906, after

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Rice's tenancy and possession had ended, a judgment by agreement between the plaintiffs and the city of Boston was entered for the sum of $8,500 without interest, and on December 13, 1906, they paid that sum to the city. They seek in this action to recover from the defendants ten per cent upon the proper proportion of this sum from the time when the assessment was levied to the end of Rice's tenancy.

The plaintiffs' right of action is based upon the provisions of R. L. c. 50, § 8, formerly Pub. Sts. c. 51, § 8. The original statute which was successively codified into these sections of the Public Statutes and of the Revised Laws was St. 1871, c. 382, § 9. Some verbal changes were made in the codification; but we prefer to look to the language of the original act, as it is properly agreed that its construction has remained unchanged. *Great Barrington* v. *Gibbons*, 199 Mass. 527, 529. That language is as follows: "When an assessment is made upon an estate, the whole or any portion of which is leased, the owner of the estate shall pay the assessment, and may thereafter collect of the lessee an additional rent for the portion of the estate so leased, equal to ten per centum per annum on that proportion of the whole sum paid, which the leased portion bears to the whole estate, after deducting from the whole sum so paid, any amount he may have received for damages to the estate, above what he has necessarily expended on such estate by reason of such damages."

It is manifest that the owner cannot collect this additional rent from his tenant until after he has himself made payment to the city. Until then, the tenant is not required to pay anything. And while the question is not free from doubt, we are of opinion that not only is the time of payment by the tenant thus delayed, but that his obligation to pay does not come into being until the owner's payment shall be made, and that the liability then becomes merely a future liability to be reckoned from that time, not a liability also for a past time.

Under the construction contended for by the plaintiffs, Rice had after December, 1900, no possible means of determining for what amount of rent he was liable; he knew only that it could not exceed what he had agreed to pay plus ten per cent on what after years of litigation might be found by a jury within the

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limit of the original assessment to be the correct betterment, or on whatever other sum within the same limit the city and the owners might agree. A construction which thus would leave the amount of a tenant's liability in the air ought not unnecessarily to be adopted. Nor can the tenant in such a case know whether the owner will avail himself of his right to pay the assessment in three or in ten annual instalments under R. L. c. 50, §§ 5, 15. If the owner should so elect, and if the tenant is under the fixed liability to pay ten per cent of the amount of the assessment, even though the payment be postponed it is yet an absolute liability, and it is difficult to see how the tenant's rights could be protected if the owner after paying one or more of the delayed instalments should default upon the others, leaving the property to be sold under the lien thereon. R. L. c. 50, § 17.

The owner moreover, if he fears that he will not receive from his tenant a proper return for the increased value of the estate, can protect himself by at once paying the assessment and thus fixing the starting point of the tenant's obligation. No such mode of protecting himself is available to the tenant.

The words of the statute, while they do not absolutely preclude the possibility of sustaining the plaintiffs' contention, are more in harmony with the view which we have taken. A provision that after the happening of a certain event one may collect a sum to which but for that provision he would have no right at all, naturally indicates that the liability is to accrue only upon such happening and is to cover only the future. The owner's obligation, or rather the charge upon his estate, does date from the levying of the assessment; but that of the tenant arises only from the terms of the statute that creates it, and cannot be extended beyond the proper scope of those terms. Nor is it material that it may be for the interest of the owner to seek by petition under R. L. c. 50, § 6, to reduce the amount of the assessment and for that reason to delay making his payment, and that he thus may lose the opportunity to gain from his tenant a return upon his involuntary investment. This simply gives him one more consideration to weigh in determining what course it will be for his interest to adopt.

The result is that as the defendants' testator was not a tenant at all when the liability of the plaintiffs' tenants accrued, this

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action cannot be maintained; the defendants' third request for rulings was rightly given; and the other questions argued need not be considered.

Exceptions overruled.

CHARLES W. BOYD *vs.* EDWIN W. TAYLOR & another.

Middlesex. November 15, 1910. — January 4, 1911.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Negligence, Employer's liability. *Evidence*, Competency. *Practice, Civil*, Conduct of trial, Exceptions, Double costs.

Boyd v. *Taylor*, 195 Mass. 272, and 202 Mass. 213, affirmed.

At the trial of an action against the proprietor of a sausage factory by an employee therein, in which the plaintiff sought to recover for injuries alleged to have been caused by his arm being drawn into a meat chopping machine due to a failure of the defendant to warn or instruct him as to that danger, and where a material question was, whether the danger was an obvious one, it appeared that the plaintiff, several months after his injury, had returned to the factory, and there was evidence tending to show that at that time the machine was in the same place, set up in the same way and being operated for the same purpose as at the time of the injury to the plaintiff. There was no evidence that the condition of the machine had been changed. The plaintiff, subject to an exception by the defendant, was allowed to testify that, in looking into the machine to see the feed screw when the machine was running as it had been when he was operating it, there was not much that could be seen other than a kind of blur. *Held*, that the evidence was relevant, material and competent.

This case previously was before this court on two occasions upon exceptions by the plaintiff to the ordering of verdicts for the defendants, and the exceptions each time were sustained. Upon exceptions by the defendants after a verdict for the plaintiff, no new question was raised, the exceptions were adjudged frivolous and double costs from the time of the allowance of the defendant's exceptions were allowed.

TORT for personal injuries received on October 30, 1901, while in the employ of the defendants, manufacturers of sausages doing business in Boston under the name of Park's Sausage and Provision Company, and caused by the plaintiff's hand being drawn into a meat chopping machine which he was operating. Writ dated April 14, 1903.

The case first was tried in the Superior Court before *Bell*, J., who at the close of the plaintiff's evidence ordered a verdict for

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the defendants. Exceptions alleged by the plaintiff were sustained by this court in a decision reported in 195 Mass. 272.

The second trial of the case in the Superior Court was before *Hardy*, J., and resulted in a verdict for the plaintiff of $5,250, which was set aside by the judge. Exceptions by the plaintiff to the ruling setting aside the verdict were overruled by this court in a decision reported under the title, *Boyd, petitioner*, in 199 Mass. 262.

The third trial of the case in the Superior Court was before *Bond*, J., and evidence was introduced by both parties. The jury disagreeing, the presiding judge ordered a verdict for the defendants. Exceptions alleged by the plaintiff were sustained by this court in a decision reported in 202 Mass. 213.

The fourth trial in the Superior Court was before *Fox*, J. The jury found for the plaintiff in the sum of $2,700; and the defendants alleged exceptions.

P. S. Maher & E. S. Hill, for the defendants, submitted a brief.

J. Noble, for the plaintiff.

RUGG, J. This case has been here twice on its merits upon the plaintiff's exceptions to verdicts directed in the Superior Court in favor of the defendants, and the exceptions have been sustained each time. 195 Mass. 272; 202 Mass. 213. Now it comes up on the defendants' exceptions, the jury having found a verdict for the plaintiff. No new question of law is presented. The testimony in its fundamental aspects is the same now as before. In the respects in which it differs only questions of fact are presented touching the credibility of witnesses or the weight of evidence. As to these matters the verdict is final. The decisions heretofore made in the cause are decisive in favor of the right of the plaintiff to go to the jury. They have become the law of the case. On their authority all the requests for rulings presented by the defendants were properly refused.

The only points now argued not distinctly referred to in the opinion in 195 Mass. 272, are whether the plaintiff was a volunteer and whether the injury was not caused by his slipping. Plainly these are covered by inference from what is there said. The plaintiff testified that he was acting under the direction of Dunton, and that he did not slip. Although there was evidence

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to the contrary, this conflict presented no question of law, but only one of fact. If the plaintiff was believed, the verdict was warranted.

The plaintiff was allowed to testify against the exception of the defendants that when he returned to the place of his injury several months after it occurred, on looking into the machine to see the feed screw, when the machine was running as it used to be run, there was not much that could be seen other than a kind of blur. The only ground urged in support of this exception is that there was no evidence that the machine was running under similar conditions as when he was hurt. It was in the same place, apparently set up in the same way, being operated for the same purpose. The conditions, in the absence of anything to show a change, might well have been found to have been nearly enough like those at the time of the injury to afford a basis for the observation made.

These exceptions appear to be frivolous, and they are overruled with double costs from the time when these exceptions were allowed.

So ordered.

ALICE L. FLINT & another *vs.* WESTCHESTER FIRE INSURANCE COMPANY & another.

Suffolk. November 28, 1910. — January 4, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Insurance, Fire.

If the person named as the insured in a Massachusetts standard policy of insurance against loss by fire of a dwelling house owned by him, which contains a provision that the policy shall be void if, without the assent of the insurance company, the property "shall be sold, or this policy assigned," sells the property without the knowledge or assent of the insurance company which issued the policy or of another company which has reinsured the risk, neither the person named in the policy as the insured nor the person to whom he has sold his interest in the land, has any further interest in the policy, which as to them is void.

The owner of certain mortgaged premises upon which was a dwelling house insured the dwelling house under a Massachusetts standard policy of insurance, "loss if any [being made] payable to" the mortgagee, "as its interest may appear," and thereafter, without the assent of the company, sold and conveyed the premises to another. Subsequently the risk of the insurance company was reinsured by a

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second company so that the reinsuring company stood in the place of the original insurer. The dwelling house having burned, the reinsuring company, by reason of the clause in the policy that it should become void in case the property was sold without the assent of the company, refused to pay anything to the owner of the property or to the insured, and, acting under the provisions of the policy which protected the mortgagee against the policy's being made void by act or default of any one else, and provided that, whenever the company should "be liable to a mortgagee for any sum for loss under this policy, for which no liability exists as to the mortgagor, or owner, and this company shall elect by itself, or with others, to pay the mortgagee the full amount secured by such mortgage, then the mortgagee shall assign and transfer to the companies interested, upon such payment, the said mortgage, together with the note and debt thereby secured," paid to the mortgagee the amount due on the mortgage, which was less than the amount of the policy, and caused an assignment of the mortgage to be executed by the mortgagee to a trustee for it. *Held*, that the assignment to the trustee was in effect an assignment to the company, and was within the rights of the company under the provision of the policy above quoted, and that neither the owner of the premises nor the insured had any rights in equity as to the mortgage or mortgage note or as to the amount of the policy beyond the amount due on the mortgage note.

BILL IN EQUITY, filed in the Superior Court on November 5, 1908, by Alice L. Flint and Edward H. Warren against the Westchester Fire Insurance Company and Lindsey K. Foster, alleging in substance that the plaintiff Flint purchased from the plaintiff Warren the real estate numbered 144 on Shurtleff Street in Chelsea, the real estate being subject to a mortgage which Warren had given to the County Savings Bank and a dwelling house thereon having been insured by Warren under a Massachusetts standard policy with the United States Fire Insurance Company for a period to extend from April 28, 1904, to April 28, 1909, Warren being named as the insured, and "loss if any [being made] payable to County Savings Bank, mortgagee, as its interest may appear"; that "said insurance was taken over or reinsured by the defendant insurance company"; that at the time of the transfer of the property to Flint by Warren, the policy also was assigned and that the insurance company then interested was notified thereof and assented thereto; that on April 12, 1908, the property insured was destroyed by fire, and that thereafter the savings bank transferred the mortgage to the defendant Foster, who threatened to foreclose it. The prayers of the bill were that the defendant Foster be enjoined from foreclosing or selling or disposing of the mortgage and the note secured thereby, that an accounting be had of the amount due

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under the mortgage, that the defendant company be ordered to pay what was found to be due upon the mortgage to Foster, that Foster thereupon be ordered to cancel and deliver up the note and mortgage, and that the defendant company be ordered to pay to the plaintiff Flint what was due under the policy above the amount due on the mortgage note.

The case was heard by *Wait*, J., upon an agreed statement of facts, which were substantially in accordance with the allegations of the bill, except that it was agreed that the sale and conveyance by Warren to Flint did not come to the knowledge of either of the insurance companies until after the fire, and were not assented to by either of them; that then the agent of the defendant company stated to the plaintiff Flint that nothing would be paid to her on the policy because she had no interest therein, but that the company intended to pay to the savings bank the amount of its mortgage and to demand an assignment thereof; that thereafter the defendant company paid to the savings bank, as mortgagee, $1,525, the amount then due on the mortgage, "in consideration of which said bank executed an assignment of said mortgage, note and policy to the defendant, Lindsey K. Foster. . . . There remains due on said mortgage the sum of $1,500 and interest described therein, unless the same has been or should be satisfied by reason of the facts set forth in these proceedings. Said Foster paid no other consideration for said assignment and took and still holds said mortgage under an oral agreement that the same was held by said Foster in trust for the Westchester Fire Insurance Company. Neither the plaintiff Flint nor the plaintiff Warren ever assented to any of the transactions recited in this paragraph. The defendant company has never paid anything under said policy in addition to the amount paid for said mortgage as herein described."

The judge ordered a decree dismissing the bill, and reserved and reported the case for determination by this court.

W. M. Noble, for the plaintiffs.

F. W. Brown, (*W. L. Came* with him,) for the defendants.

HAMMOND, J. This seems to be a very plain case. The insurance policy issued by the United States Fire Insurance Company contained a provision that the policy should be void if

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without the assent, in writing or in print, of the company the property insured "shall be sold or this policy assigned." By the subsequent sale to Flint without such consent this condition was violated, and, except as to the mortgagee which was protected by another clause hereinafter mentioned, the policy was void. Neither Warren, nor Flint, had any interest in the policy as owner of the property.

Nor was the situation changed by the contract of reinsurance between the insurer and the defendant, the Westchester Fire Insurance Company. The contract could not enlarge the rights of Warren or the plaintiff under the policy, or renew rights already lost. The only party as to whom the contract still existed as one of insurance was the mortgagee, the County Savings Bank; and this was by virtue of a clause in the policy which, so far as material to the question before us, reads as follows: "If this policy shall be made payable to a mortgagee of the insured real estate, no act or default of any person other than such mortgagee or his agents, or those claiming under him, shall affect such mortgagee's right to recover in case of loss on such real estate: provided, that . . . whenever this company shall be liable to a mortgagee for any sum for loss under this policy, for which no liability exists as to the mortgagor, or owner, and this company shall elect by itself, or with others, to pay the mortgagee the full amount secured by such mortgage, then the mortgagee shall assign and transfer to the companies interested, upon such payment, the said mortgage, together with the note and debt thereby secured."

So far as respects this case the defendant company stood in the place of the original insurer. It elected to take an assignment under this clause in the policy. The fact that at its request the assignment was made to Foster in trust for the company rather than to the company itself is of no consequence. The assignment to him was in effect an assignment to the company. The policy in the case of *Graves* v. *Hampden Fire Ins. Co.* 10 Allen, 281, cited by the plaintiff, does not appear to have contained a clause for an assignment like the clause in this policy. That case therefore is clearly distinguishable from this.

It is also immaterial whether the original amount of insurance exceeds the amount of the mortgage. No matter what was the

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original amount of the insurance, after the sale only the amount necessary for the protection of the mortgagee still stood, and even that stood subject to the provision for an assignment.

In accordance with the terms of the report the order is

Bill dismissed.

POSTAL TELEGRAPH CABLE COMPANY OF MASSACHUSETTS *vs.* CITY OF CHICOPEE.

Suffolk. November 28, 1910. — January 4, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Telegraph Company. Wires. Constitutional Law, Interstate commerce, Police power. *Municipal Corporations,* By-laws and ordinances. *Way,* Public. *Chicopee. Equity Jurisdiction.*

Chapter 17 of the ordinances of the city of Chicopee of 1891 provided among other things that the mayor and aldermen should have exclusive power to license the erection and maintenance of telegraph and other lines of electric wires within the city, and that any license granted pursuant to the ordinance should be subject to the right of the city, free of charge, to place its fire alarm, telegraph or other electric wires upon the poles so licensed to be maintained. An inspector of wires of the city also was provided for in the ordinance. In 1891, a telegraph company, which applied for permission to erect poles and maintain wires on certain public ways in the city, was allowed such permission only subject to the requirements of the ordinance and to an agreement to save the city harmless from loss, cost or damage resulting from the erection or maintenance of the poles or wires, and accordingly it erected its poles and wires and the city placed thereon the wires of its fire alarm system, and in 1906 the wires for its municipal electric light system, over some of which was carried an alternating current of high tension. In a suit in equity by the telegraph company to enjoin the city from maintaining electric wires upon the plaintiff's poles, a master, to whom the case was referred, found that the additional expense to the plaintiff caused by the presence of the defendant's wires was very small, as also was the cost to the defendant of inspection, that while the presence of the city's high tension wires upon the plaintiff's poles made it more dangerous for persons to go upon the poles, no accidents had happened because of that fact, and that, while high tension alternating currents close to the plaintiff's wires would cause induction, the defendant's wires had had no appreciable effect upon the plaintiff's business. *Held,* that both in its purposes and in its application the ordinance of the city was reasonable and proper and was within the authority given to cities by R. L. c. 25, § 54; c. 26, §§ 2, 6, to regulate the erection and maintenance of wires for the transmission of electricity within their boundaries.

A police regulation of a State, affecting interstate commerce only indirectly, in a field which has not been occupied by congressional legislation, is not a regulation of such commerce within the implied prohibition of the Constitution of the United States.

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Chapter 17 of the ordinances of the city of Chicopee of 1891 provided among other things that the mayor and aldermen should have exclusive power to license the erection and maintenance of telegraph and other lines of electric wires within the city, and that any license granted pursuant to the ordinance should be subject to the right of the city, free of charge, to place its fire alarm, telegraph or other electric wires upon the poles so licensed to be maintained. An inspector of wires of the city also was provided for in the ordinance. A telegraph company, which had received a permit from the city to place its poles and wires in certain public ways in the city, which were post roads, which permission was made provisional upon observance of the requirements of the ordinance and upon an agreement by the company to save the city harmless from loss, cost or damage resulting from the erection or maintenance of the poles and wires, allowed the city to place upon the poles the wires of its fire alarm system and of its municipal lighting plant. Very little expense or inconvenience resulted to the company therefrom. *Held*, that all that was done by the city under the ordinance had but a slight and incidental effect upon interstate commerce, through the imposition of a local regulation of the use of the streets for the purpose, primarily and principally, of preventing the erection of unnecessary and objectionable poles to the obstruction of travel, and, secondarily, to provide compensation to the city for the expense of inspecting the line of telegraph for the protection of the public; and that therefore neither the ordinance nor the acts of the city were in violation of the implied prohibition of the Constitution of the United States against interference with interstate commerce.

An ordinance of a city entitled "Electric Wires," which regulated the erection and maintenance of poles and electric wires in the public highways, contained a provision that the city, upon granting permission to any person or corporation to erect poles and maintain wires, should have the right to license the location of lines by any other person or corporation upon such poles upon payment being made to the corporation owning the poles of a reasonable compensation, but that the city should be permitted to place electric wires for its uses upon the poles free of charge. A company received and accepted a permit from the city in 1891, which was made subject to the ordinance called "Electric Wires," but which referred to it by the wrong number. Wires of the city, used in its electric fire alarm and its municipal lighting systems, without objection by the companies were maintained on the poles of the company and of several successors to its rights until 1908 when the then operating company sought by a bill in equity to enjoin the city from maintaining any wires upon its poles. It appeared from a report of a master to whom the suit was referred, that to compel the city to take its wires from the plaintiff's poles and to erect new poles for them would involve a large expenditure of money and would result in overcrowding the streets with poles. This court, without determining whether the ordinance, in making the provision as to permitting the city to use the poles free of charge while other companies licensed by the city might use them upon making compensation, went too far, *intimated* that, even if because of such provision in the ordinance the maintenance of the city's wires upon the plaintiff's poles was a technical invasion of the plaintiff's right, that right, under the circumstances of the long apparent acquiescence by the plaintiff and its predecessors in the use of the poles by the city and of the expense and overcrowding of the streets with poles which would be involved in causing the removal of the city's wires, could not be enforced by injunction in equity, but only by seeking damages in an action at law.

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KNOWLTON, C. J. This is a bill in equity * to enjoin the defendant from maintaining certain electric wires upon the plaintiff's telegraph poles. In 1891 the Postal Telegraph Cable Company of New York erected a telegraph line in the city of Chicopee from the line of the city of Springfield on the south, by a somewhat circuitous route, through Chicopee Centre to Chicopee Falls, and thence northwesterly to the line of the city of Holyoke, this being a part of a telegraphic system extending into and through other States, which was used in part in interstate commerce. By a series of conveyances through different corporations this line has passed into the ownership of the plaintiff, which holds it, with all the rights, and subject to all the liabilities of the original owner. It runs through public highways which are post roads. The plaintiff's predecessor in title had a right to construct and maintain such a line, and the plaintiff has a right to maintain it along public highways, under the U. S. Rev. Sts. § 5263. This right also is reaffirmed and extended to other classes of corporations by the R. L. c. 122, § 1. But it is subject to the right of cities and towns to make any reasonable local regulations in regard to the exercise of it. R. L. c. 25, § 54; c. 26, §§ 2, 6. These regulations, under the Constitution of the United States, must be such as do not interfere with or regulate directly interstate commerce. These propositions are all well established by decisions of the Supreme Court of the United States.

On June 15, 1891, the plaintiff's predecessor in title, acting in accordance with the R. L. c. 122, §§ 1, 2, applied to the mayor and aldermen for authority in writing, fixing the location of its line and establishing its rights. In July, 1891, the city of Chicopee passed an ordinance, which is chapter seventeen of the ordinances of that year, and which provided that the mayor and aldermen should have the exclusive power to license the erection and maintenance of telegraph and telephone and other lines of electric wires within the city, and that any license granted

* The bill was filed in the Supreme Judicial Court on June 19, 1908, and on September 11, 1908, a substitute bill was filed by leave of court. The suit was referred to Daniel B. Ruggles, Esquire, as master and, upon the filing of the master's report, was reserved by *Sheldon*, J., for determination by this court.

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pursuant to the ordinance should be subject to the right of the city, free of charge, to place its fire alarm telegraph or other electric wires upon the poles or through the conduit so licensed to be maintained, and to the right of the city to license the location of lines by any other person or corporation upon said poles and through said conduit, upon payment being made of a reasonable compensation, to be determined by the parties, or, if they fail to agree, to be determined by the mayor. There was also a requirement that all parties licensed to erect poles and fixtures and to maintain electric wires should give to the city an agreement in writing to save it harmless from all claims for damages, costs, expenses, charges or compensation, for or on account of the erection, maintenance or use of such poles, fixtures or wires. It also provided for the appointment and term of office of an inspector of wires, and for many other things, with a view to the proper regulation of the business of maintaining and using electric wires within the city.

The committee on highways, to whom was referred the application of the Postal Telegraph Cable Company for a permit, reported on July 6, 1891, recommending the granting of the petition, with certain modifications, and that the company must agree to comply with the city ordinance entitled, "Electric Wires." The ordinance was ordained at or about the same time. On the day when the report was filed it was accepted, and the clerk was instructed to notify the petitioner that the petition would be granted upon compliance with the restrictions and agreements therein enumerated. On September 7, two months later, an order was passed by the mayor and aldermen that permission be given the petitioner to erect its lines in the specified streets, "upon the following express conditions, a violation of any of which shall at the election of the board of aldermen operate as a forfeiture of the permission and rights herein granted, to wit:

"1st. That said company shall agree to comply with the requirements of chapter 22 of the Revised Ordinances of the city of Chicopee.

"2d. That said company shall use the poles now erected in said city on Broadway from the house of Charles T. Hendrick to the Overman Wheel Company's factories."

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"4th. That the officers and members of the fire department may, in the event of a fire and whenever in connection therewith they deem it proper, cut the wires of said company and that if so cut, they shall be repaired at the expense of said company.

"5th. That said company shall, before any work or construction in said streets or highways is done, execute under seal a contract in the words following, all blanks being properly filled, and deliver the same to the city."

Then followed an agreement to indemnify the city from loss, cost or damage suffered by reason of the erection or maintenance of the poles or wires. This contract was signed by one of the officers of the company, but was never returned to the defendant. By a clerical error the chapter of the ordinance was referred to in this order as twenty-two, instead of seventeen, the number intended. Chapter twenty-two is an ordinance relative to public parks, and it makes no reference to locations, poles or wires. Nearly all of the line was built shortly after this location was granted, although about half a mile of it was constructed before the license was granted.

This was the first location granted in the city of Chicopee for the erection and maintenance of electric wires. Since then the city has granted four locations to the Holyoke Street Railway Company, one location to the United Electric Light Company of Springfield, two locations to the J. Stevens Arm and Tool Company, thirty-one locations to the New England Telephone and Telegraph Company, and one location to the Postal Telegraph Cable Company of New York. There are now ten miles of trolley lines in Chicopee, not including span wires and feed wires, about six miles of municipal fire alarm lines averaging two wires, and about thirty miles of poles of the New England Telephone and Telegraph Company, carrying, on the average, a large number of wires.

Beginning more than ten years ago and ending before April, 1908, the city put municipal electric light wires upon eighty-seven of the plaintiff's poles, making two hundred and twenty-three hitches in all, and put eighty hitches in all of municipal fire alarm wires on the poles of the plaintiff. Up to the end of that time all this was done without objection of the plaintiff or

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its predecessors in title, and without any requirement or tender of payment for the benefit. During this time the general officers of the plaintiff and its predecessors had no knowledge of this use of the poles, although the company's district foreman, whose duty it was to report anything going on along the lines of interest to the company, knew it and reported it to the circuit manager at Boston. The master's report gives us the ordinance in full, together with an elaborate statement of conditions as to different lines of wires in different places, and other important facts, much in detail.

It is obvious that in framing the ordinance the city council attempted to make careful provision for the protection of the public, in view of the probability of a great increase in the number of applications for authority to transmit electricity for various purposes through the streets. It is certain that careful regulation of the erection and maintenance of poles and wires in the streets of a city is necessary, in the public interest. As cities grow compact, and the need of using many wires for the transmission of electricity for many different purposes, on closely built streets, becomes more urgent, relief from inconvenience and danger can only be had by the removal of overhead wires from the streets and by placing them in conduits underground. Legislation for this purpose, applicable especially to great cities, has become common in different parts of the country. By the running of lines of wire upon different sets of poles in a crowded city, the difficulty of extinguishing fire and preventing a conflagration is often greatly increased, as well as the danger and inconvenience in using the streets in the ordinary way, and the unsightliness of numerous poles and wires. It was therefore reasonable and proper that the ordinance should forbid the unnecessary duplication of lines and of poles in public places. This was done in the requirement that licenses might be granted by the mayor and aldermen to other companies to use the same poles by making reasonable compensation therefor. This was nothing more than a regulation that, if two or more companies desired to run two lines of wires through a street, they might be required, if it could be done reasonably, to put them on the same line of poles, the two companies sharing the expense equitably. This was entirely reasonable. To the same effect and for the

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same purpose was the provision in the order granting the permit to the plaintiff's predecessor, that the company should "use the poles now erected in said city on Broadway from the house of Charles T. Hendrick to the Overman Wheel Company's factories." The plaintiff has made no objection to these regulations. The city's wires for a fire alarm telegraph and those for the municipal lighting which was undertaken several years later were also to be provided for, and if there had been a provision for pecuniary compensation by the city for the benefit that it might derive in this way, the reasons already referred to plainly would have been an ample justification for the requirement that the plaintiff's predecessor should allow the wires to be put upon its poles. The reason for this regulation in the ordinance plainly was to protect the interest of the public. That the plaintiff would be subjected to some slight burden and increased expense in the construction of its line, for the protection and convenience of the public in the use of the streets and in the preservation of their property, surely did not deprive the mayor and aldermen of the right to impose the requirement upon it as a regulation. The very idea of regulation involves, not only possible restriction in the exercise of rights and the use of property, but also possible expenditure in the public interest, to make one's property available or one's rights enjoyable in the best way. The rights and interests of the public and the individual must be considered alike, in making police regulations for the common good. Unless this burden is excessive, and plainly unreasonable in reference to the benefits to be derived from the imposition of it, the ordinance is not invalid by reason of the requirement that it makes of the plaintiff.

Does the fact that the city derives a benefit from it, for which it makes no direct payment, change the character of the provision? In framing the ordinance the city might well take into account the probable expense to be incurred for the inspection of the lines from time to time, to diminish the risk of accident, and the liability of the city for injuries suffered by travellers from an unsafe condition of the poles or wires. The mayor and aldermen properly could require a pecuniary payment by the telegraph company to meet this cost of inspection, and this risk of loss, to which the city would be subjected. This has been

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directly decided, even when the payment required was in the form of a tax, if the amount was such that it did not appear to be a tax for revenue, but merely a compensation for the reasonably anticipated cost of protecting the public. *Western Union Telegraph Co.* v. *New Hope*, 187 U. S. 419. *St. Louis* v. *Western Union Telegraph Co.* 148 U. S. 92. *Atlantic & Pacific Telegraph Co.* v. *Philadelphia*, 190 U. S. 160. *Postal Telegraph Cable Co.* v. *Taylor*, 192 U. S. 64.

The burden of expense put upon the plaintiff and its predecessors is very small. The first company was obliged, for its own purposes, to erect poles for its wires. The plaintiff's line in the city of Chicopee consists of about two hundred and fifty poles, and five wires upon one six-pin cross-arm, attached to the top gain of each of these poles. The poles, as they are described by the master, would readily carry many more wires besides those belonging to the city, — probably many more than the plaintiff will ever have occasion to put upon them. The attachment of the city's wires has increased the expense to the plaintiff in only a trifling sum. Indeed, it is found that this increased expense did not attract the attention of the general officers of the company until more than ten years after a considerable part of it had been incurred, and then only when a letter had been written by the defendant's inspector of wires, demanding that a cross-arm on some of the poles be lowered one gain, to make a place for the city's wires. The master has found that the cost to the city of the inspection of the plaintiff's poles and wires is small. Probably it is smaller than was expected when the ordinance was adopted; but it is a real and constant expense every year. Very likely, in a series of years covering the life of a line of poles, this expense would be much more than the additional cost to the plaintiff of a bar on the poles for such wires as the city would want to put there. We are of opinion that the ordinance, in the parts in question was reasonable and proper, and so within the authority conferred by the R. L. c. 25, § 54, and c. 26, §§ 2, 6.

The plaintiff complains that, while a part of the defendant's electric lighting is done by the direct system, carrying a very light current of electricity, another part of it is done with an alternating current of high tension, and that the proximity of

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wires carrying such a current increases the danger to persons making repairs upon its line, and is objectionable by reason of the effect of induction. The master has found that there is more danger and that more care is required in making repairs where wires of high tension are in close proximity than where there are none; but he also found that there had been no injury to the plaintiff's servants or to its property from this cause. It is obvious that this is a matter simply calling for proper care on the part of those who are engaged in the work, and that the care must be adapted to circumstances of greater danger. As bearing upon the questions involved, this does not seem to us a matter of much importance. It relates simply to the method of doing work which is done in every city and large town, and in which there is no inherent difficulty, if proper precautions are taken.

The master considered the subject of induction, and has found, in substance, that the inductive effect of nearby high-tension wires interferes with the efficient operation of a telegraph system, but that the defendant's wires have had no appreciable effect upon the plaintiff's business in this particular. In the first place, for the most part, these wires are not charged with electricity in the daytime. In the next place, to produce any serious interference with the plaintiff's business would require a longer line of parallel high-tension wires than exists in that city. It was not shown that there had been any specific instances of trouble on the plaintiff's line in Chicopee, caused by the proximity of high-tension wires, or that the increase of voltage on its system was due in any degree to inductive difficulties caused by the proximity of the defendant's wires. He did find, however, that, by reason of inductive disturbances over its entire system, the plaintiff had been compelled to increase its voltage on its system over that which was formerly sufficient for the operation of its lines. Of course he found that inductive disturbance from other lines did not depend at all upon the wires being upon the same poles, except so far as they might be in closer proximity than if attached to an independent line of poles. The possibility of detriment to the plaintiff from induction, by reason of having these wires on its poles instead of upon independent poles, seems to be of little consequence, as against

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the importance of keeping the obstructions in the streets of the city as few as possible.

If these requirements of the ordinance were not unreasonable or invalid under the statutes of this Commonwealth, it follows almost necessarily that they were not an interference with interstate commerce. They were adopted in the exercise of the police power, in reference to a local matter of public importance, about which Congress had taken no action. In *Western Union Telegraph Co.* v. *Pendleton*, 122 U. S. 347, 359, it was said that, within the limitation that it does not encroach upon the free exercise of the powers vested in Congress by the Constitution, a State "may, undoubtedly, make all necessary provisions with respect to the buildings, poles, and wires of telegraph companies within its jurisdiction which the comfort and convenience of the community may require." A provision almost identical with that in the present case was upheld in *St. Louis* v. *Western Union Telegraph Co.* 148 U. S. 92, and was assumed to be reasonable on the rehearing of the case, in 149 U. S. 465, and in the opinion in *Western Union Telegraph Co.* v. *New Hope*, 187 U. S. 419. In the first of these cases an additional requirement of a money payment by the telegraph company to the city was upheld, on the ground that it was to be treated as rent for the "absolute, permanent and exclusive appropriation" of space in the streets. Assuming that the statutes of this Commonwealth do not authorize a city to claim rent of a telegraph company for the use of the streets as property, the principles involved in other branches of this decision and in other decisions of the same court seem to cover the present case. It is well established that a police regulation of a State, affecting interstate commerce only indirectly, in a field which has not been occupied by congressional legislation, is not a regulation of such commerce within the implied prohibition of the Constitution of the United States. *Mississippi Railroad Commission* v. *Illinois Central Railroad*, 203 U. S. 335, 346. *Lake Shore & Michigan Southern Railway* v. *Ohio*, 173 U. S. 285, 298. All that has been done by the defendant, under this ordinance, seems to have but a slight and incidental effect upon interstate commerce, through the imposition of a local regulation of the use of the streets, for the purpose, primarily and principally, of preventing the erection of unnecessary

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and objectionable poles to the obstruction of travel; and secondarily, to provide compensation for the expense to the city of inspecting the line of telegraph for the protection of the public.

If it were held that the ordinance goes too far in requiring the plaintiff to permit other companies, if licensed by the city, to use its poles upon making compensation, and the city to use them for public purposes without compensation, it does not follow that the plaintiff should have an injunction. The vote of the city upon the report of the committee, which was communicated to the plaintiff's representatives, referred to the ordinance as entitled "Electric Wires." Then the formal order, which referred to the ordinance by a wrong number, put the plaintiff on inquiry as to the contents of the ordinance. It is hardly possible that the plaintiff's representatives did not understand, in general, the conditions under which they were permitted to erect their poles. The use of these poles by the city under these circumstances, for more than ten years without objection or claim of compensation, will hardly permit the enforcement of the plaintiff's alleged equitable right against the defendant. There is much in the case to support the defendant's argument that there has been laches. If the highest officers of the company were ignorant of the facts, its agents, who were in charge of business of this kind, knew all about them.

If the existence of the defendant's wires upon the plaintiff's poles were a technical invasion of the plaintiff's right, we are of opinion, upon the facts of this case, that the relief granted should not be an injunction against the continuance of the wires upon the poles, thus compelling the erection of new poles and the attachment of the wires to them. The master has found that this change could not be made without a large expenditure of money. Moreover, it would involve a crowding of the streets with poles, which the mayor and aldermen have rightly been attempting to prevent. It appears that, at present, in one or two places, there are four or five poles in front of one house. The master finds that, if the change were made as the plaintiff desires, there would be at least two places where there would be four or five poles within a distance of seventy-five feet. It would be more equitable, if the plaintiff's right

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were established, that its relief should be by compensation in damages.

But for reasons already stated, the entry will be,

Bill dismissed.

G. P. Wardner, for the plaintiff.

L. White, for the defendant.

HERBERT G. FAIRFIELD *vs.* EDWARD F. LOWRY & another.

Suffolk. November 29, 1910. — January 4, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Sale, Of business. *Good Will*. *Contract*, Construction, In writing, Consideration. *Name*. *Evidence*, Admitted without objection, Extrinsic affecting writings. *Equity Pleading and Practice*, Decree.

A woman, named Marion Smith Lowry, whose father was named Henry A. Smith and who had the right to carry on an insurance business under the names Henry A. Smith and Henry A. Smith & Co. as well as under her own name, signed an instrument in writing, which also was signed by a man doing business under the name of H. G. Fairfield & Co., as follows: "In consideration of $1,000 cash, (the receipt whereof is hereby acknowledged) and the agreement to pay the sum of $800 additional on December 1st next, we hereby agree to sell and deliver on October 1st next, all our right, title and interest in the insurance business of the late Henry A. Smith, Henry A. Smith & Co. and Marion Smith Lowry, to H. G. Fairfield & Co. Mrs. Lowry to continue in interest until October 1st, and the remaining 10% to be paid within 2 years from date." *Held*, that the language of this instrument was not doubtful, that it did not purport to give to the purchaser of the business the right to use the name of the seller or either of the other names which she had the right to use, and that under the provisions of R. L. c. 72, § 5, the purchaser of the business had no right to use in that business any of those names without the consent in writing of the seller or of the personal representatives of Henry A. Smith.

If, in a suit in equity to enforce the alleged provisions of an agreement in writing, of which the language is not doubtful, evidence is admitted without objection of preliminary negotiations of the parties which afterwards were merged in the agreement in writing, the fact that such evidence was admitted without objection gives it no probative effect and it has none.

If a person, who has been carrying on the insurance business in his own name and in the name of his father which he had the right to use, sells the business without agreeing not to engage in the same business again and without selling the use of his name or consenting in writing to the use of the name of his father, although he cannot derogate from the effect of the sale by attempting to deprive

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the purchaser of any part of the business which he has sold to him, he still can engage in the same business himself, using his own name or that of his father, if he does not solicit business from former customers of himself or of his father.

If a person sells an insurance business for $1,800, of which $1,000 is paid in cash, and the remaining $800 is to be paid on a day named, but makes no agreement not to engage in the insurance business, and, when the second payment is made, signs a receipt in writing, by which "in consideration of" such final payment he "agrees not to engage in the insurance business for a period of five years without the consent of the purchaser," this promise is not binding for lack of a consideration, unless there is a consideration because the further agreement was made by the seller in order to obtain immediately the $800 due to him instead of being obliged to sue for it, which here was not considered.

A final decree in a suit in equity, which makes certain declarations in regard to the rights of the parties and concludes with an order that the bill be dismissed, cannot be complained of by the plaintiff on account of such declarations if he put in issue the matters upon which the declarations as to the rights of the parties are made.

BILL IN EQUITY, filed in the Superior Court on November 12, 1909, and amended on November 22, 1909, seeking to restrain the defendant Marion Smith Lowry from conducting the insurance business until August 12, 1912, from imparting information about or otherwise hindering the plaintiff in obtaining such a business sold by her to him, and from in any way interfering with the conduct of such business by the plaintiff, also seeking to restrain the defendant Edward F. Lowry from in any way interfering with the business of insurance purchased by the plaintiff from Marion Smith Lowry and from attempting to procure such business for himself or any other person.

In the Superior Court the case was heard by *Fessenden*, J., who made the following findings of material facts:

On August 5, 1907, the plaintiff was engaged in the business of fire and casualty insurance in Boston under the name of H. G. Fairfield and Company, and the defendant Marion Smith Lowry was engaged in a similar business in Boston in which she owned and used the names of Henry A. Smith, Henry A. Smith and Company, and Marion Smith Lowry.

The plaintiff and the defendant Marion Smith Lowry had been in negotiation for the sale of the latter's business to the former; and that defendant had stated to the plaintiff that she would not sell to him the names "Henry A. Smith," "Henry A. Smith and Company," and "Marion Smith Lowry." On the same August 5, 1907, after these preliminary negotiations an agree-

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ment was dictated by the plaintiff and was drawn up and signed by the defendant Marion Smith Lowry, as follows:

"Boston, Mass. August 5, 1907.

"In consideration of One Thousand Dollars ($1000) cash, (the receipt whereof is hereby acknowledged) and the agreement to pay the sum of Eight Hundred Dollars ($800) additional on December 1st next, we hereby agree to sell and deliver on October 1st next, all our right, title and interest in the Insurance business of the late Henry A. Smith, Henry A. Smith & Co. and Marion Smith Lowry, to H. G. Fairfield & Co.

"Mrs. Lowry to continue in interest until October 1st, and remaining 10% to be paid within 2 years from date.

"Marion Smith Lowry
for Henry A. Smith & Co.
H. G. Fairfield & Co."

The plaintiff paid to the defendant Marion Smith Lowry $1,000 on August 5, 1907, and it was agreed that she should manage the business until he returned from a trip abroad or until October 1, 1907. On or about October 1, 1907, the business was removed to the office of the plaintiff, including the transfer of all ledgers, policy registers, expiration cards, customers' cards and all other data and memoranda relating to the business; and the defendant Marion Smith Lowry was placed upon the plaintiff's pay-roll from about January 1, 1908, having received $50 in full to that time for services. On December 1, 1907, the second payment of $800 became due and payable under the agreement, but the plaintiff delayed payment until January 21, 1908, when he told the defendant Marion Smith Lowry that he would not make the payment unless she would sign a new agreement which he had prepared and which provided that she would not engage in the insurance business for the term of five years from August 5, 1907, without the written consent of the plaintiff.

The instrument proposed as this second agreement was as follows:

"Boston, Mass. Jan. 21, 1908.

"Received of H. G. Fairfield & Co. Eight Hundred Dollars, the same being the second payment (or a total of Eighteen Hundred Dollars) on the purchase of the Henry A. Smith and Marion

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Smith Lowry Insurance business, in consideration of which the undersigned agrees not to engage in the insurance business for a period of five years without the consent of the purchaser.

"Estate Henry A. Smith.
Marion Smith Lowry."

The defendant Marion Smith Lowry signed this instrument and received from the plaintiff the sum of $800, which was the second payment provided for under the original agreement.

The third and final payment of $200 provided for in the original agreement became due and payable on August 5, 1909; but was not paid on that day. The plaintiff refused to make this payment, and told this defendant that he would only pay her $175 because he wished her to retain an interest in the business as he might want to use the name "Henry A. Smith."

The defendant Marion Smith Lowry left the employment of the plaintiff on August 14, 1909. During the period of her employment that defendant had assisted the plaintiff in securing and carrying on the business sold by her to him and he used the names of "Henry A. Smith" and "Henry A. Smith and Company" in connection with the business without objection on her part; but she never had given to him any written consent to the use of such names or any of them, unless the contract of August 5, 1907, contained such consent. When she left the employment of the plaintiff she did not take away any property of any kind belonging to the business sold by her to him, and she did not at any time during her employment by the plaintiff or since leaving his employ directly or indirectly act in inducing any of her former customers to take away their business from the plaintiff or to give their business to any other person. The judge found that the plaintiff made an average monthly net profit of $200 from his commissions on the business sold to him. In addition to these amounts he received contingent commissions to the amount of at least $200, and retained all the registers, ledgers, cards and other data and memoranda relating to the business.

After the defendant Marion Smith Lowry left the employ of the plaintiff she notified him to discontinue the use of the names "Henry A. Smith," "Henry A. Smith and Company" and "Marion Smith Lowry" and informed him that the use of

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such names by the plaintiff "will seriously interfere with my business," and she also notified various insurance companies for which the complainant then was acting as agent under the aforesaid names or some of them that she had severed her connection with the plaintiff and retained the right to the use of such names in the insurance business as formerly and that the plaintiff had absolutely no right to the use of such names.

The defendant Edward F. Lowry took out a license as an insurance broker in this Commonwealth on August 17, 1909. He entered the insurance business against the express wishes of his wife, the defendant Marion Smith Lowry, and was not aided directly or indirectly by her in securing any insurance business.

He knew of the agreements signed by her at the time he entered the insurance business and was acquainted with some of the persons who were her customers when she sold her business to the plaintiff. He received business from some of these former customers of his wife.

The judge found that in the negotiations conducted between the parties for the purchase and sale of the business of the defendant Marion Smith Lowry, she stated to the plaintiff that she was about to retire from the insurance business. He found that the principal value in the business sold by the defendant Marion Smith Lowry to the plaintiff consisted in the exclusive information which was contained in the books, papers, cards and other memoranda delivered by her to the plaintiff as to the names of the customers, and the details of the insurance policies held by those customers, particularly the dates of expiration of such policies. He found that the policies had been written to run for terms of one, three and five years and that the terms of about one half of the policies had not yet expired. He found that the value of the information imparted by the defendant Marion Smith Lowry to the plaintiff would be impaired if it was imparted to other persons engaged in the insurance business to a degree depending largely upon the amount of information so imparted and the number of insurance men to whom it might be so imparted. He found that the value of the business would be greatly impaired if that defendant should solicit or accept business from her former customers.

If material, he found that such policies as had been written

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by the plaintiff in renewal of those issued by the defendant Marion Smith Lowry had been written by him under the name Henry A. Smith & Co. and that the plaintiff had used that name in sending out expiration notices and requests for renewals. If material, he found that the use of the name Henry A. Smith & Co. would be valuable to the plaintiff in procuring renewals of policies.

The judge further found that at the trial of the case the plaintiff's counsel stated that the plaintiff made no contention that either of the defendants had made use of the names "Henry A. Smith," "Henry A. Smith & Co.," or "Marion Smith Lowry" in the conduct of insurance business since August 14, 1909, and also found that the plaintiff introduced no evidence bearing on the question whether or not the right to use those names passed to the plaintiff by the contract of August 5, 1907, or otherwise; but that the matter was gone into on cross-examination of the plaintiff and also in the evidence introduced by the defendants; and that the plaintiff's counsel stated that he did not consider it necessary to argue that question because the plaintiff's contention was merely that the defendants were wrongfully soliciting insurance from old customers of the defendant Marion Smith Lowry, and that as bearing on the latter question the former question was immaterial.

The judge made a final decree, declaring that the defendant Marion Smith Lowry did not convey to the plaintiff the right to the use of the names "Henry A. Smith," "Henry A. Smith and Company" and "Marion Smith Lowry" or any of those names, and did not give the plaintiff any written consent to the use by him of any or all of those names; that the plaintiff had no legal right to the use of any or all of those names; that the defendant Marion Smith Lowry was not bound to refrain from the use of any or all of those names, nor was either defendant bound to refrain from competition with the plaintiff in the insurance business; and ordering that the plaintiff's bill be dismissed.

The plaintiff appealed.

W. L. Came, for the plaintiff.

F. M. Forbush, for the defendants.

SHELDON, J. The plaintiff does not deny that upon the findings made at the hearing his bill was rightly dismissed. His

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contention is that the right to use the names "Henry A. Smith," "Henry A. Smith & Co." and "Marion Smith Lowry" in carrying on the insurance business, did pass to him by the agreement between himself and Mrs. Lowry, and that the defendants have no right to use those names in such business; and also that Mrs. Lowry is bound not to compete with him in that business, and not to solicit for herself or any other person the patronage of her former customers or of the former customers of Smith or Smith and Company, and not to interfere in any way with the plaintiff's peaceful enjoyment of the business which he purchased from her.

The written agreement of August 5, 1907, between the plaintiff and Mrs. Lowry did not purport to give to him the right to use the names in question. The effect of this material circumstance is in no wise weakened by the fact that the language of this agreement was chosen by the plaintiff himself. The fact that she allowed him to use those names for a time is sufficiently accounted for by the friendly relations that existed between the parties while she was in his employ, and does not necessarily show an understanding on her part that he had acquired the right to use them. Nor is the language of the instrument doubtful. Such cases as *Winchester* v. *Glazier*, 152 Mass. 316, 323, and *Insurance Co.* v. *Dutcher*, 95 U. S. 269, 273, have no application here. Under the provisions of R. L. c. 72, § 5, the plaintiff has no right to use in his business either of these names without the written consent respectively of Mrs. Lowry or of Smith's personal representative.

We have not considered the finding that before the execution of the written agreement Mrs. Lowry had told the plaintiff that she would not sell to him the names in question; for it may well be doubted whether it was open to the defendants to prove this fact, as the preliminary negotiations were merged in the written agreement. If so, the fact that the evidence was received without objection would not give to it any probative effect. *Butterick Publishing Co.* v. *Fisher*, 203 Mass. 122, 132, 133, and cases cited.

After the sale by Mrs. Lowry to the plaintiff of her interest in the insurance business, she had not the right to derogate from the effect of what she had done by attempting to deprive the plaintiff of any part of the business which she had sold to him.

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But this did not prevent her from engaging in the same business herself, or from using her own name or that of her father in carrying on such business, although she would not be allowed to solicit business from the former customers of herself and her father. She could not so conduct her own new business as to injure the business which she had sold to the plaintiff. *Old Corner Book Store* v. *Upham*, 194 Mass. 101. *Foss* v. *Roby*, 195 Mass. 292. *Hoxie* v. *Chaney*, 143 Mass. 592.

The plaintiff does not rely upon Mrs. Lowry's promise made in January, 1908, not to engage in the insurance business for five years. He concedes the correctness of her contention that this promise was invalid for lack of consideration. So we need not consider whether under our decisions the obtaining of the actual money due to her instead of being put to suit to enforce her rights would not have been an adequate consideration for a new promise by her. *Hastings* v. *Lovejoy*, 140 Mass. 261, 265. *Abbott* v. *Doane*, 163 Mass. 433. *Parrot* v. *Mexican Central Railway*, *ante*, 184. *Tobin* v. *Kells*, *ante*, 304.

The recitals of the decree were properly made. *Braman* v. *Foss*, 204 Mass. 404, 410. Certainly the plaintiff, having put those matters in issue, cannot complain of the court's passing upon them.

Decree affirmed.

SAMUEL SMALL & others *vs.* ALONZO F. CAHOON & others.

Barnstable. November 30, 1910. — January 4, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Religious Society.

A church building in a village in a town was paid for out of funds obtained from the sale of pews, and belonged to the pew holders. It was controlled by the society consisting only of pew owners or persons who rented pews, and none others had the right to vote at meetings of the society. An article of the constitution of the society was as follows: "In all meetings of the society (or pew holders) a notice shall be posted up in the meeting house two weeks before said meeting." A new religious society was organized in an adjoining village in another town by most of the persons who attended church in the church building mentioned above. A meeting of the society controlling the church building was attempted to be called for the purpose of removing the church building to the adjoining village, but the two weeks' notice of the meeting required by the

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constitution was not given. At an adjournment of this meeting a vote was passed to remove the church building to the neighboring village. Certain pew holders, who were not present at the meeting or at the adjournment thereof, protested against the attempted action, and brought a suit in equity to restrain the removal of the church building. *Held*, that, even if a vote properly passed at a meeting regularly called to remove the church building to an adjoining village in another town would have been valid against the objection of a minority of the pew holders, which was not decided, such minority could not be bound by the vote passed at a meeting not properly called at which they were not present, and that the plaintiffs were entitled to the injunction prayed for.

BILL IN EQUITY, filed in the Superior Court on April 14, 1910, to restrain the removal of a church building in that part of Harwich called South Harwich to the adjoining village of South Chatham in the town of Chatham.

The bill alleged that the building known as "The Bethel Church" was situated in that part of the town of Harwich called South Harwich and near the town line of Chatham and was built and paid for by subscribers, who in token of their money subscriptions became pew holders and thereby the proprietors and owners of the church building; that the plaintiffs and certain other persons, whose rights the plaintiffs represented, being themselves pew holders and the heirs of pew holders, had proprietary rights in the church building; that the plaintiffs were informed and believed that a certain religious society calling itself "The Bethel Society," composed chiefly, if not wholly, of residents of the nearby village of South Chatham in the town of Chatham, had voted to remove the Bethel Church building to a point about one third of a mile eastward from its present location and had appointed the defendants a building committee of eight to carry the vote into effect, and that the so called Bethel Society had been recently organized for the purpose of removing the Bethel Church building; that the plaintiffs had remonstrated against the carrying into effect of the vote of the so called Bethel Society, but that the defendants proposed to carry out the vote by moving the building; that the removal of the church building was not required by any ground of necessity but purely for the slightly better convenience of a few of the leading spirits of the so called "Bethel Society" who resided near the proposed location of the building; and that the plaintiffs had no adequate remedy at law and were about to suffer irreparable damage to their rights and property and interests.

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The bill prayed that the members of the building committee of the "Bethel Society" should be restrained and enjoined from removing or causing to be removed from its present location in South Harwich the building known as the "Bethel Church."

The case was referred to Raymond A. Hopkins, Esquire, as master. He filed a report, in which he found the following facts:

The Bethel Society was organized in the year 1857 by people living in the villages of South Harwich and South Chatham, and was intended to be a free and independent church, having no connection with any denomination. The money was raised by a sale of the pews in the church building, thereafter to be erected, and the pews became the property of the owners, except that the society reserved the right to tax the pews yearly for the support of the meetings. The Bethel Church building was built from funds obtained by the sale of the pews. The pew owners were also called the proprietors. From 1858 to about the year 1875 the meetings were maintained by a tax levied upon the pews in the church building. After the year 1875 that method of raising money was changed and thereafter down to the time of the report the meetings were maintained by a system of voluntary contributions or offerings. Two plaintiffs in this case were at the time of the filing of the bill pew owners by inheritance from original owners of pews. The plaintiffs represented by power of attorney other persons not residents of Harwich who had interests in the pews by inheritance, and the plaintiffs and the persons represented by them were all opposed to the removal of the church building.

After the year 1875, when the meetings were maintained by the system of voluntary contributions, all persons who attended services at the Bethel and who contributed to the support of the meetings became members of the society, so called. At the annual meetings held in the Bethel all persons who voted were pew owners or persons renting pews, according to article 8 of the constitution adopted at the time the church was built. Article 1 of the constitution was as follows: "Article 1. In all meetings of the Society (or pew holders) a notice shall be posted up in the meeting house two weeks before said meeting." There was no organized society other than as shown by the constitution. There was no church organization or parish.

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After the year 1875 the annual meetings of the church were held at the Bethel in South Harwich, also in the store of Levi Eldredge in the village of South Chatham, and in Village Hall in South Chatham, and for the last fifteen years the annual meetings had been held in Village Hall, and there had been no attendance from South Harwich.

There were no by-laws or records to show who were members of the Society. Services had been held since 1858 every year down to the date of the report.

The church building at the time of the report was in the town of Harwich within a few hundred feet of the Chatham line. There were no houses in the village of South Harwich east of the church. The proposed location for the church building was about three thousand feet east from the location at the time of the report and would be in the centre of the village of South Chatham.

It was admitted by the defendants that a certain religious society, calling itself the Bethel Society, composed of residents of the village of South Chatham, had recently been organized, and had appointed a building committee of eight, who were the defendants in this case, and that the Bethel Society had been organized for the purpose of removing the Bethel Church building. Certain by-laws have been adopted by the recently organized Bethel Society.

On December 4, 1909, a warrant was issued for a meeting of the members of the Bethel Society in Village Hall in South Chatham, for Monday, December 13, 1909, to act upon certain articles. Article 2 reads as follows: "To see if the Society will vote to authorize a new Society to be formed for the purpose of removing the Bethel Meeting House from its present location to a convenient site in the village of South Chatham." Less than two weeks' notice was given of this meeting. For many years, notwithstanding article 1 of the constitution, which provides for notice posted two weeks previous to the meetings, this article had not been complied with. Annual meetings were held giving less than fourteen days' notice in the years 1863, 1864, 1868, 1869, 1871, 1879, 1882, 1883 and 1890.

At the meeting of December 13 no action was taken, but an adjournment was made until December 23, 1909, and at that

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meeting it was voted to remove the Bethel Meeting House from its present location to a convenient site in the village of South Chatham. No member of the society or pew owners from South Harwich attended this meeting. The plaintiffs remonstrated against the carrying into effect of the vote of the so called Bethel Society, whereby the building was to be moved. The number of persons residing in South Harwich who attended services at Bethel Church during the last year was limited to less than four persons, and none of these had been at all regular in their attendance, and no children residing in South Harwich attended the Sunday school. Most of the persons who attended Bethel Church lived in the village of South Chatham. The moving of the building would be convenient for the South Chatham people and the attendance probably would be increased by moving the building. The members of the Sunday school were all children from South Chatham, with the exception of two, who came from the village of West Chatham. The number of enrolled Sunday school scholars was fifty. The attendance at the Bethel meetings was from twenty-three to forty when conditions were favorable and from fifteen to twenty when not favorable. The attendance at the Sunday school was from twenty to forty.

A fire in South Harwich about ten years before had destroyed a number of dwelling houses, which had not been rebuilt. It would be beneficial and for the convenience of a large portion of the congregation of Bethel Church if the church building was situated near the proposed new location.

There were various amendments to the master's report on findings requested by the parties, which are not important.

The case came on to be heard on a motion for a final decree, upon the pleadings, the master's report and his amendments thereto and all questions of law therein, before *Richardson*, J., who by agreement of the parties reserved and reported the case for determination by this court.

H. H. Baker & J. H. Paine, for the plaintiffs, submitted a brief.

C. Bassett, for the defendants.

SHELDON, J. Upon the facts found by the master and the statements made at the argument by the defendant's counsel, it appears that before the year 1875 the title to this church was in

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the pew holders. The building seems to have been erected on the land of some third person with his consent. It was paid for out of the funds obtained from the sale of pews. It was the pew holders who held the beneficiary interest in the building and were entitled to its enjoyment. *In re New South Meeting House*, 13 Allen, 497, 508. The constitution under which the original society was organized is to the same effect. It provides for the meetings of "the Society (or pew holders)." It recognizes only pew holders, or persons renting pews. The expenses of the church were to be met by taxes upon the pews. Since 1875, however, the church has been supported by voluntary contributions, and not by such taxes. But we have not before us the terms of the vote by which this change was made; and there is nothing to indicate that the pew holders have abandoned any of their rights of property. On the contrary, these rights were still recognized as they had been before. The right to vote at meetings of the society and thus to control its affairs was still, as before, conceded only to pew owners, or to persons who at the time rented pews. The plaintiffs are pew holders.

A new religious society calling itself the Bethel Society has been organized in the neighboring village of South Chatham, and the purpose of the defendants is to move this building into that village and appropriate it to the use of the new society, thus permanently depriving the plaintiffs of their proprietary rights in the building as it now stands. *Stebbins* v. *Jennings*, 10 Pick. 172. Manifestly this cannot be done without their consent, unless they are concluded by the terms of the vote passed at the meeting of the old society on December 23, 1909. But the meeting at an adjournment of which this vote was passed, was not called as required by the first article of the constitution, the plaintiffs had not seen the notice which was posted in the church in attempted compliance with that article, and one of them had no knowledge at all that the meeting was to be held. None of them was present at that meeting or at the adjournment thereof. Even if a vote properly passed at a duly called meeting to remove the building to an adjoining village in another town and there turn it over to a new society would have been valid and effectual against the objection of persons who, like the plaintiffs, had rights of property in the building, (*Baker* v. *Fales*, 16 Mass. 488,)

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they cannot be bound by this vote. *Reformed Methodist Society of Douglas* v. *Draper*, 97 Mass. 349. *Canadian Religious Association* v. *Parmenter*, 180 Mass. 415.

None of the exceptions taken by the defendants to the master's rulings upon the admission or exclusion of evidence has been argued, and we treat them as waived.

The plaintiffs are entitled to a decree against the defendants as prayed for.

So ordered.

FRED J. BASSILL *vs.* PHOEBE M. BASSILL & another.

Suffolk. November 30, 1910. — January 4, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Equity Pleading and Practice, Master's report, Cross bill. *Equity Jurisdiction*, Submission to jurisdiction.

In a suit in equity, where a master files a report containing findings for the defendant on all the points in dispute between the parties, and the plaintiff files no objections or exceptions to the report, the findings of the master are conclusive, and the bill must be dismissed.

In a suit in equity by a husband against his wife, who held the legal title to certain real estate, and against a person to whom she had leased the real estate, the plaintiff alleged that his wife held the real estate for his benefit, and prayed for an order compelling her to convey to him the legal title. The defendants filed a cross bill praying for a decree ordering the plaintiff in the original suit to remove from and surrender the real estate in question and to desist from prosecuting further an appeal from a decree against him in an ejectment process named in the bill and in the cross bill. The plaintiff demurred to the cross bill. The trial judge overruled the demurrer to the cross bill, and made a final decree dismissing the original bill and granting to the defendants the relief prayed for in their cross bill. The plaintiff, although he did not contend that his bill was not dismissed properly on the findings of fact, yet insisted that his demurrer to the cross bill should have been sustained and that the final decree was erroneous in giving the defendants affirmative relief based upon the cross bill. *Held*, that, as the cross bill did not seek for the determination of any questions other than those raised in the original bill, it was no less within the jurisdiction of the court than that bill itself, and that the affirmative relief was granted properly to the defendants.

A plaintiff, who in a bill in equity to compel the conveyance to him of certain real estate alleged to be held by one of the defendants for the benefit of the plaintiff asks the court to pass upon the questions involved in an ejectment process then pending, cannot object to a cross bill, which raises the same questions, on the ground that the court which first takes jurisdiction of a subject matter will hold it to the exclusion of other courts, because by asking the court in equity to con-

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sider and adjudicate the very questions thus involved he has waived whatever right he had to the application of this principle to the case, and having submitted himself to the jurisdiction of the court in equity he cannot complain.

HAMMOND, J. The bill alleged a trust for the plaintiff's benefit in certain real estate owned, as of record, by the defendant Phoebe M. Bassill, the plaintiff's wife, and leased by her to the defendant Fellows, and called for a conveyance to the plaintiff of the legal title. A cross bill was filed to which was filed a demurrer which was overruled, and the plaintiff appealed. The case went to a master * who reported findings for the defendants on all points in dispute under the bill and cross bill. No objections or exceptions to this report having been filed, the findings are conclusive. The trial judge † dismissed the bill, and in accordance with the prayers in the cross bill made a final decree ordering the plaintiff to remove from and surrender the premises in dispute and to desist from further prosecuting his appeal from a judgment against him in the ejectment suit named in the bill and in the cross bill. From this final decree the plaintiff appealed, and the case is before us upon the two appeals.

The plaintiff does not argue that upon the findings of the master the bill was not properly dismissed, but he insists that the demurrer to the cross bill should have been sustained, and that the final decree is erroneous in so far as it gives affirmative relief to the defendants based upon the cross bill. But neither the objections to the cross bill nor to the final decree are tenable.

By his bill the plaintiff sought to have the court pass upon the question of title to the property as between him and the defendants, including the validity of the lease to Fellows and the rights of Fellows thereunder. The cross bill did not seek for a determination of any other questions than those raised in the bill.

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* E. M. Johnson, Esquire, and afterwards, on account of the illness of Mr. Johnson, James W. Santry, Esquire.

† *Fessenden*, J. The bill was filed in the Superior Court on November 12, 1909, and the cross bill was filed by leave of court on December 2, 1909. The cross bill alleged that, subject to a certain mortgage, Phoebe M. Bassill owned outright the real estate in question, which she leased to Fellows, and prayed for a decree ordering the plaintiff in the original suit to remove from and surrender the real estate and to desist from prosecuting further an appeal from a decree against him in an ejectment process named in the bill and in the cross bill.

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Its purpose was to have established and enforced against the plaintiff whatever rights, as finally determined by the court, the defendants might have in the matters involved; and it is no less within the jurisdiction of the court than is the bill itself. "It is a well settled principle, that a court of equity, after it has acquired jurisdiction of a subject matter in controversy between parties, will, as far as possible, settle all questions in litigation touching it, and do complete justice to all parties, so that there may be an end of controversy. A cross bill for relief is proper in cases where, in the original suit, all things in litigation touching the subject matter cannot be brought before the court, but the defendant, in order to obtain a complete settlement of the controversy, is entitled to some relief which the scope of the plaintiff's suit will not afford him." Morton, J., in *Richards* v. *Todd*, 127 Mass. 167, 169. This cross bill was well within this principle. It was the proper way to seek affirmative relief against the plaintiff. *Andrews* v. *Gilman*, 122 Mass. 471.

One of the plaintiff's objections to the decree is that it passes upon the questions involved in the ejectment suit then pending in the Superior Court on his appeal from the judgment rendered against him in the lower court; and in support of that objection he relies upon the general principle that the court which first takes jurisdiction of a subject matter will hold the same to the exclusion of other courts. It is unnecessary to inquire whether the principle be generally applicable, for it is plain that inasmuch as the plaintiff in his bill asked the court to consider and adjudicate the very questions thus involved he has waived whatever right he had to the application of the principle to this case, and having submitted himself to the jurisdiction of this court of equity, he cannot now complain.

It follows that the decree overruling the demurrer to the cross bill and the final decree should both be affirmed; but so far as respects the final decree a manifestly clerical error should first be corrected. In the fifth line of the second paragraph as printed in the record before us the words "Fred. J." should be stricken out, and the words "Phoebe M." inserted in place thereof.

So ordered.

W. E. Ulmer (*G. W. Reed* with him,) for the plaintiff.

H. James, Jr., for the defendants

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PHINEAS C. KINNEY, executor, *vs.* TREASURER AND RECEIVER GENERAL.

Middlesex. November 30, 1910. — January 4, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Tax, On legacies and successions. *Inheritance Tax. Constitutional Law.*

Under St. 1907, c. 563, § 1, as amended by St. 1909, c. 268, and St. 1909, c. 527, § 1, promissory notes owned and possessed by a testator in another State at the time of his death there, which are secured by mortgages on real estate in Massachusetts, are "property within the jurisdiction of the Commonwealth" and therefore are subject to the tax on legacies and successions.

Promissory notes owned and possessed by a testator in another State at the time of his death there, which are secured by mortgages upon real estate in Massachusetts, are in the jurisdiction of this Commonwealth so as to subject them to a succession tax here within the doctrine of the Constitution of the United States that allows States to impose taxes only upon persons or property within their jurisdiction.

Under St. 1907, c. 563, § 1, as amended by St. 1909, c. 268, and St. 1909, c. 527, § 1, a promissory note owned and possessed by a testator in another State at the time of his death there, which is secured by the assignment of a deposit book representing an interest in the funds of a voluntary association held in Massachusetts by trustees "for the purpose of investing in real and personal estate" and "invested principally" in real estate in this Commonwealth, is "property within the jurisdiction of the Commonwealth" and therefore is subject to the tax on legacies and successions.

The question, whether promissory notes owned and possessed by a testator in another State at the time of his death, which are secured by a transfer of property which only can be forced to be applied to the payment of the notes by the aid of the Massachusetts courts, are for that reason within the jurisdiction of this Commonwealth so as to subject them to a succession tax under our laws, here was mentioned as having been raised in argument but was not passed upon.

BILL IN EQUITY, filed in the Probate Court for the county of Middlesex on July 14, 1910, by the executor of the will of George H. Rugg, late of Claremont in the county of Sullivan in the State of New Hampshire, who died there on July 14, 1909, and whose will was allowed by the Probate Court of the State of New Hampshire for the county of Sullivan on September 25, 1909, praying for instructions as to what parts, if any, of the property of the plaintiff's testator, real and personal, were at the death of the testator within the jurisdiction of this Com-

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monwealth, and also as to what tax, if any, the plaintiff was liable to pay to the treasurer of this Commonwealth, under St. 1907, c. 563, § 1, as amended by St. 1909, c. 268, and St. 1909, c. 527, § 1.

In the Probate Court *McIntire*, J., made a decree that certain promissory notes belonging to the testator at the time of his death and secured by mortgages of real estate in this Commonwealth were not within the jurisdiction of this Commonwealth and were not subject to the statutes of Massachusetts relating to the taxation of legacies and successions. The defendant appealed.

The appeal came on to be heard before *Rugg*, J., who, at the request and with the consent of all the parties interested, reserved it for determination by the full court.

D. Malone, Attorney General, *& F. T. Field*, Assistant Attorney General, for the defendant.

F. G. Cook, for the plaintiff.

KNOWLTON, C. J. This is a bill in equity brought by the executor of a foreign will for instructions as to whether certain promissory notes secured by mortgages upon real estate in Massachusetts, and one note secured by an assignment of an interest in a real estate trust, all belonging to the testator at the time of his death, are subject to a succession tax under the laws of this Commonwealth. The notes were all in his possession at his domicil in New Hampshire.

The St. 1907, c. 563, § 1, as amended by St. 1909, c. 268, and by St. 1909, c. 527, § 1, under which the defendant claims the tax, includes "All property within the jurisdiction of the Commonwealth, corporeal or incorporeal, and any interest therein, whether belonging to inhabitants of the Commonwealth or not," and makes it subject to a tax upon the succession, if it passes by will or the laws regulating intestate succession, with certain exceptions which we need not consider. This language indicates an intention on the part of the Legislature to tax all property that it has the power to tax. The statute is as broad as the jurisdiction of the Commonwealth. The question before us is whether these securities are property within the jurisdiction of the Commonwealth, in reference to taxation upon the succession.

Under the laws of Massachusetts a mortgagee takes not merely

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a lien upon the land as security but he holds the legal title to it, subject to a right of redemption in the mortgagor. The interest of the mortgagee is made subject to taxation by our statutes, and the property taxable to the mortgagor is diminished by a deduction of the value of the interest held by the mortgagee. St. 1909, c. 490, Part I. §§ 16, 18, 45. *Sullivan* v. *Boston*, 198 Mass. 119, 124. While, for general purposes, the interest of the mortgagee is treated as personal property, it has a local situs, and carries with it an ownership of the land until it is redeemed by the payment of the debt in performance of the condition. The debt, which is the obligation of the debtor to pay, and the land, which is the security for the payment of the debt, are individual parts of a single valuable property in the mortgagee, which may be made available in different ways. The debt belongs with the mortgage, and it must coexist to give the mortgage validity. For that purpose it has a situs within the jurisdiction of the State where the land lies. It was held in *McCurdy* v. *McCurdy*, 197 Mass. 248, that the tax upon the succession to real estate in this Commonwealth, which belonged to a decedent in another State and was subject to a mortgage, was to be assessed only upon the value of the property above the mortgage. This was upon the ground that what passed upon the death of the mortgagor was only the value of his interest, which was the value of the real estate less the amount of the debt that was a charge upon it. This was equivalent to holding that, upon the death of the mortgagee, his interest in the real estate, to the amount of his debt, would pass in succession to his representatives.

The same doctrine has been held in States where the mortgagee has only a lien upon real estate. It is the law of the Supreme Court of the United States. *Savings & Loan Society* v. *Multnomah County*, 169 U. S. 421. *Bristol* v. *Washington County*, 177 U. S. 133. It is also established by well reasoned opinions of courts in several States. *Allen* v. *National State Bank*, 92 Md. 509. *In re Merriam's estate*, 147 Mich. 630. *In re Rogers estate*, 149 Mich. 305. *Mumford* v. *Sewall*, 11 Ore. 67. The fact that the laws of the State and the jurisdiction of its courts must be invoked for the preservation and enforcement of rights under the mortgage is an important consideration leading to this result. Upon the facts of this case,

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we are of opinion that the notes and mortgages are property in the jurisdiction of this Commonwealth, within the meaning of the statute, although they were held by the testator at his domicil in New Hampshire at the time of his death. We are also of opinion that they were in this jurisdiction so as to subject them to a succession tax here, within the doctrine of the Constitution of the United States that allows States to impose taxes only upon persons or property within their jurisdiction.

The note secured by the conveyance of the deposit book in the Cambridge Real Estate Associates* differs from the others only in the nature of the property conveyed as security. This property was a valuable interest in real estate in Cambridge, the legal title to which was held by trustees. The testator held an equitable interest in it as security for the note at the time of his death. This interest passed under the will, for the use of his legatees at the time of his death, just as the mortgaged property did. It passed to the executor for purposes of administration, to be turned into money which was to be paid by the executor to those for whose use it was collected. Although the testator held only an equitable interest in this real estate, instead of a legal interest, we perceive no difference in principle between the passing of this interest in succession and the passing of his interest under a mortgage held in like manner as security for a debt. We are of opinion that all this property is subject to the tax upon succession prescribed by our law.

There is strong ground for the defendant's contention that, because the debts in all of these cases could only be enforced, in the ordinary way, against the debtor by the aid of our courts, we ought to hold that they are property within the jurisdiction of the Commonwealth, and subject to taxation under this statute.

* This was "a voluntary association of individuals for the purpose of investing, in real and personal estate, funds contributed by the said individuals, — the legal title to said funds and to the property in which the same may be invested being held by" trustees. "On July 14, 1909, the Cambridge Real Estate Associates . . . was composed of citizens of Cambridge, Massachusetts, only, and the property of said associates was vested as to legal title in two citizens of said Cambridge, as trustees, and was invested principally in real estate situated in said Cambridge. The only investment other than in real estate in Cambridge was in two shares of the Calumet and Hecla Mining Company stock."

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See *Blackstone* v. *Miller*, 188 U. S. 189; *Matter of Daly*, 100 App. Div. (N. Y.) 373, affirmed in 182 N. Y. 524; *Rothschild* v. *Knight*, 176 Mass. 48, 54. The question raised by this part of the argument, except so far as it bears upon the other part of the case, we do not decide.

Decree of Probate Court reversed.

CHARLES D. SIAS & others, trustees, *vs.* HERBERT T. CHASE & others.

Norfolk. November 30, December 1, 1910. — January 4, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Devise and Legacy. Words, "Foregoing legacy."

The will of a testator, who left a widow but no children, gave a large number of legacies to relations and friends, and created a trust fund of which his widow was to have the income for life. After her death there were to be paid twenty-two legacies to charities, and the residue of the fund was to be distributed as follows: "I further direct my trustees to so divide and distribute all the rest and remainder of said trust fund among the survivors of my legatees named below that each survivor shall receive such a proportional part thereof as the amount of his foregoing legacy bears to the sum remaining to be distributed; to wit:" Here followed the names of thirty-five persons who were relations or friends of the testator, to each of whom a legacy had been given in the preceding part of the will. The declarations and provisions of the will made it plain that the clause quoted must be construed as including in the distribution all the property of the testator not previously disposed of. *Held*, that only those persons of the thirty-five named who survived the widow of the testator were entitled to share in the residue; and that the part of the fund which each survivor would receive was to be in such proportion to the whole amount to be distributed as the amount of the legacy given to him by the preceding part of the will bore to the total amount of the legacies sharing in the distribution.

A testator, who left a widow but no children, gave a large number of legacies to relations and friends, and created a trust fund of which his widow was to have the income for life and out of which after her death twenty-two legacies to charities were to be paid, and then directed that the residue of such trust fund should be distributed among the survivors of thirty-five persons named who already had been made legatees in preceding parts of his will. By a codicil the testator made the following provision: "Whereas by said will I gave a legacy to each of the following named persons, to wit: [naming thirty-four persons who were legatees under his will, some of whom were named in the residuary clause and some of whom were not]. And whereas, upon mature reflection, I do not wish a legacy to any one of the persons named above to lapse by reason of his or her death prior to my decease, or for other cause I now direct that no legacy to

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any one of the persons above named, shall lapse, but that, if any one of those named above shall predecease me, his or her share shall be distributed as if it were his or her intestate estate." *Held*, that this provision of the codicil referred only to the legacies given to the persons named in the parts of the will preceding the residuary clause, and had no application to the final gift to the survivors of the thirty-five persons enumerated in the residuary clause.

A codicil to a will contained the following provisions: "And whereas by my said will I gave the estate in remainder in all my real property, devised to my wife for life, to my niece C., I now modify that devise and give to her the estate in remainder only in my real property in said West Harwich, which I have long occupied as a summer residence and have been accustomed to call my 'homestead,' and which estate I inherited from my father." The will contained a residuary clause disposing of all the property of the testator not previously disposed of. *Held*, that the portion of the remainder of the testator's real estate, which by the will was to go to his niece C. but which by the clause in the codicil quoted above was separated from her share, fell into the residue of the testator's estate and was to be disposed of under the directions relating to such residue.

The will of a testator, who left a widow but no children, gave a large number of legacies to relations and friends, and created a trust fund of which his widow was to have the income for life and which after her death was to be applied first to the payment of twenty-two legacies to charities, and then was to be disposed of as the final residue of her estate as follows: "I further direct my trustees to so divide and distribute all the rest and remainder of said trust fund among the survivors of my legatees named below that each survivor shall receive such a proportional part thereof as the amount of his foregoing legacy bears to the sum remaining to be distributed; to wit:" Here followed the names of thirty-five persons who were relations or friends of the testator, to each of whom a legacy had been given in the preceding part of the will. There were codicils to the will which contained additional legacies increasing the amounts given to some of the legatees. *Held*, that the term "foregoing legacy" in the residuary clause above quoted referred to the legacies in the preceding part of the will and did not include the additional legacies to some of the same legatees by the codicil, which were to be disregarded in computing the proportional parts in which the residue was to be distributed.

BILL IN EQUITY, filed in the Supreme Judicial Court on June 28, 1910, by the trustees under the will of Caleb Chase, late of Brookline, for instructions.

The case came on to be heard before *Rugg*, J., who reserved it upon the pleadings for determination by the full court.

Caleb Chase died on November 23, 1908, leaving no issue. His widow, Salome B. Chase, survived him, and died on March 26, 1910. The will of Caleb Chase was executed on January 21, 1899. There were seven codicils. The first codicil was executed on December 26, 1899, and the second codicil was executed on October 19, 1901. The five later codicils are not material. The will and codicils were proved on December 16, 1908.

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The provision of the will giving directions to the trustees as to the distribution of the residue of a trust fund created by the will in regard to which the plaintiffs sought instructions, is quoted in the opinion.

The provision in the first codicil referred to in the opinion was as follows:

"Whereas by my said will I gave to my brother Erastus Chase ten thousand dollars, I now give to him an additional ten thousand dollars, — making in all a legacy of twenty thousand dollars. [This brother was named in the residuary clause quoted in the opinion.]

"And Whereas by said will I gave a legacy to each of the following named persons, to wit: [naming thirty-three persons, twenty-six of whom were named in the residuary clause of the will quoted in the opinion and eight of whom were not named in that clause.]

"And whereas, upon mature reflection, I do not wish a legacy to any one of the persons named above to lapse by reason of his or her death prior to my decease, or for other cause, I now direct that no legacy to any one of the persons above named, shall lapse, but that, if any one of those named above shall predecease me, his or her share shall be distributed as if it were his or her intestate estate."

The provision in the second codicil referred to in the opinion was as follows:

"And whereas by my said will I gave the estate in remainder in all my real property, devised to my wife for life, to my niece Cora M. Berry, I now modify that devise and give to her the estate in remainder only in my real property in said West Harwich, which I have long occupied as a summer residence and have been accustomed to call my 'homestead,' and which estate I inherited from my father."

S. Z. Bowman, for the trustees, stated the case.

R. M. Morse, (*N. A. Tufts & J. R. Lazenby* with him,) for the legatees living at the time of the filing of the bill, who were those that survived the testator's widow.

A. Hemenway, for the executors of the will of Salome B. Chase.

Asa P. French, for Annie E. Ginn.

G. L. Mayberry, for Florence T. Chase and others.

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H. H. Baker, (*G. C. Coit* with him,) for Annie M. Chase.

E. A. Whitman, (*S. J. Elder* with him,) for the trustees for Cora M. Berry and for Edward Glines.

G. C. Dickson & C. S. Knowles, for Anna C. Rogers, submitted a brief.

C. T. Gallagher & F. A. Fernald, for Phoebe Currier, submitted a brief.

A. J. Howard, for John H. Ellis, submitted a brief.

KNOWLTON, C. J. The plaintiffs, trustees under the will of Caleb Chase, bring this bill for instructions as to their duties under the following clause of the will:

"And I further direct my trustees to so divide and distribute all the rest and remainder of said trust fund among the survivors of my legatees named below that each survivor shall receive such a proportional part thereof as the amount of his foregoing legacy bears to the sum remaining to be distributed, to wit," etc. Then follow the names of thirty-five legatees. This residue was what would remain after the giving of a large number of legacies to relatives and friends, and after the creation of a trust fund of which the widow was to have the income for life, and after the death of the widow and the payment from the fund of twenty-two legacies to as many charities.

Numerous questions have been raised; but the decision of a few of them will render the others inapplicable. Although a large amount of property is in the hands of the trustees for distribution, the questions presented seem simple.

The first inquiry is as of what time are survivors to be determined. The persons mentioned are not members of a class. They are relatives and friends of the testator, to all of whom legacies had been given in the earlier part of the will. By this clause they are to share in a fund which does not take definite form, with the amount of it fixed, until after the death of the widow, and the subtraction from it of the amounts given to charities. We think it plain that only those who survive the widow are included. This is in accordance with numerous decisions in similar cases. *Hulburt* v. *Emerson*, 16 Mass. 241. *Rich* v. *Waters*, 22 Pick. 563. *Denny* v. *Kettell*, 135 Mass. 138. *Coveny* v. *McLaughlin*, 148 Mass. 576. *Fargo* v. *Miller*, 150 Mass. 225. *Crapo* v. *Price*, 190 Mass. 317. *Brown* v.

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Wright, 194 Mass. 540. *Boston Safe Deposit & Trust Co.* v. *Blanchard*, 196 Mass. 35.

It is contended in behalf of some of the heirs of the testator that this clause is void for uncertainty, or that it should be so construed as to leave a large part of the fund undisposed of, to be distributed as intestate estate. The will contains the strongest indications of the testator's purpose to dispose of all of his property. The first clause of disposition is, "I give, bequeath and devise all my property and estate of whatever nature and wherever situated, as follows." The property bequeathed and devised in trust, of which this fund is a part, is described as, "All the rest and remainder of my estate." The clause in question directs the distribution of "all the rest and remainder of said trust fund." In some of the codicils there is also an express recognition of the testator's purpose to include all of his property in this testamentary disposition. We have no doubt that this clause should be construed as including in the distribution all the property not previously disposed of.

Nor is there any ground for question in regard to the proportions in which the legatees are to receive it. The language in which the direction is expressed is inaccurate. The part of the fund that each survivor will receive is in such proportion to the whole amount to be distributed, as the amount of his legacy is to the whole amount of the legacies sharing in the distribution, instead of in the proportion that his legacy is to the sum remaining to be distributed. This follows from the fact that the entire residue is to be divided. As the share of each one is represented in the proportion by the amount of his legacy, and as the amount of all the legacies will represent the shares of all together in the whole residue to be divided, each one will receive such a share of this residue as his share of the legacies bears to the whole amount of these legacies. See *Bartlett* v. *Houdlette*, 147 Mass. 25; *Shattuck* v. *Balcom*, 170 Mass. 245; *Chambers* v. *Chambers*, 41 La. Ann. 443; *Heyward* v. *Glover*, 2 McCord Ch. 395; *Gray's estate*, 147 Penn. St. 67.

The next question is whether the provision in the first codicil, reciting the giving of legacies to thirty-four persons named, and directing that no legacy to any one of these persons shall lapse by reason of his or her death prior to the testator's decease, or

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for other cause, includes the right to share in the rest and residue of the estate, or refers only to the legacies given to these persons in the former part of the will. In *Quincy* v. *Rogers*, 9 Cush. 291, 297, Chief Justice Shaw said that, "in common parlance, as well as in a more precise use of language, a 'legacy' is distinguishable from the gift of a residue, or share in a residue." This language is quoted with approval in *White* v. *Ditson*, 140 Mass. 351, 359. The case of *Lyman* v. *Coolidge*, 176 Mass. 7, is also in point. See also *Pendergast* v. *Tibbetts*, 164 Mass. 270; *Hall* v. *Severne*, 9 Sim. 515. Moreover, it is not to be presumed that this provision in the codicil was intended to include shares in the residue which, by the terms of the clause in question, were given only to those who not only survive the testator, but survive his widow. We are of opinion that this part of the codicil has no bearing upon the mode of distribution under the residuary clause of the will.

That part of the remainder in the real estate which by the will was to go to Mrs. Berry, but by the second codicil was separated from her share, falls into the residue, and is to be disposed of by the trustees under the authority of the will; and the proceeds are to be distributed, as a part of the fund, to the survivors of the legatees referred to. *McLaughlin* v. *Greene*, 198 Mass. 153. *Smith* v. *Haynes*, 202 Mass. 531. *May* v. *Brewster*, 187 Mass. 524.

The term "foregoing legacy," in the clause in question, refers to the legacies in the preceding part of the will, and does not include any additional legacies under the codicils increasing the amounts given to some of the legatees.

The distribution is to be made among the persons included in the first class * in the plaintiff's bill, in such proportions that the amount given to each shall be in the same proportion to the whole amount distributed, as the amount of his legacy, given in the preceding part of the will, bears to the whole amount of the legacies included in making the distribution.

So ordered.

* The first class of persons as set forth in the plaintiff's bill was entitled "Legatees now Living." The second class was entitled "Legatees who died before the Death of the Testator," and the third class was entitled "Legatee who died after the Death of the Testator and before the Death of the Widow."

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LEWIS BURNHAM *vs.* GEORGE H. WILSON & another.

Suffolk. December 1, 1910. — January 4, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Agency, Scope of authority. *Mortgage*, Of real estate. *Payment*. *Equity Jurisdiction*, Estoppel. *Evidence*, Relevancy, Competency.

The fact that a mortgagee of real estate, who retained in his possession the mortgage and the note secured thereby, which was overdue, gave authority to an agent to collect and receive for him the interest upon the note, does not without more tend to indicate that the agent was authorized to receive payment of the principal due upon the note; nor is it such conduct on the part of the mortgagee as would justify the owner of the equity of redemption in believing that the agent had such additional authority nor estop the mortgagee in a suit in equity against him by a subsequent owner of the equity of redemption, after the payment to the agent by the plaintiff's predecessor of the entire amount due upon the note, from setting up in defense lack of authority in the agent to receive payment of the principal.

In a suit in equity by the owner of the equity of redemption of certain real estate against the holder of a mortgage thereon, in which it appears that the principal of the note had been paid by the plaintiff's predecessor in title to one who had acted as agent for the defendant in receiving payments of interest, and the plaintiff contends that the mortgage should be discharged because the defendant held the agent out as having authority to receive payment of the principal, the plaintiff introduced, as tending to show such holding out, evidence that the agent had collected a part of the principal due on another note from another person for the defendant, but it appeared that such fact was not known to the plaintiff's predecessor when he paid to the agent the principal of the note in question. *Held*, that, not knowing such fact, the plaintiff's predecessor could not have been influenced thereby, and therefore that the evidence had no bearing on the question of ostensible authority.

BILL IN EQUITY, filed in the Superior Court on March 4, 1910, seeking to compel the discharge of a mortgage, held by one of the defendants, upon premises owned by the plaintiff, the plaintiff alleging that the mortgage note had been fully paid to one Fisher who was the agent of the defendants.

In the Superior Court the case was heard by *Richardson*, J. The material facts in evidence are stated in the opinion.

At the close of the evidence the defendant asked for the following rulings: "(1) On all the evidence the plaintiff is not entitled to recover. (2) There is not sufficient evidence in

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the case which if believed by the court would warrant a finding in favor of the plaintiff." The rulings were refused. The judge filed the following memorandum of findings:

"I find, that the amount of the principal of said mortgage of $1,500, was, on or about May 23, 1900 (long after the maturity of the note) paid by Joshua Simpson — he then owning the equity — to Andrew P. Fisher in good faith, he then supposing he had authority to receive it; and he had no notice of the assignment of the mortgage to George H. Wilson, Jr. I find that neither the note nor the mortgage was ever delivered by George H. Wilson, Sr. to the defendant, George H. Wilson, Jr. Said Fisher was authorized by the defendants to receive the interest which became due on the mortgage, and did pay the interest which became due semi-anually on the mortgage, down to the death of said Fisher, which occurred in October 1909 — and it appears that he paid the interest over to George H. Wilson, Sr. who was entitled to receive it according to an agreement between the senior and the junior Wilson.

"Upon all the evidence in the case I find that Mr. Simpson believed and had reason to believe that Fisher had authority to receive payment of the principal as well as the interest; and if a loss must fall, which does not appear either upon the owner of the equity or upon the defendant, I think it must fall upon the defendants because Fisher had been put in the position by them of apparently being the proper party to whom payment might be made of the principal, as well as the interest. I think the plaintiff is entitled to the relief which he claims."

A decree for the plaintiff was ordered; and the defendants alleged exceptions.

W. H. Bent, for the defendants.

W. H. Brown, for the plaintiff.

SHELDON, J. There was ample evidence that Fisher was authorized by the defendants to receive payments of interest upon the mortgage note here in question, and that is not now in dispute. But we are unable to find in the evidence any sufficient support for the claim that Fisher had authority to receive payment of the principal sum due. The judge at the hearing was unable to find such authority, although he found that Simpson,

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when he paid the principal sum to Fisher, "believed and had reason to believe that Fisher had authority to receive payment of the principal as well as the interest," that is, that Fisher had been held out to Simpson by the defendants as having such authority, so that Simpson was justified by their conduct in believing that such was the fact. The fundamental question in the case is whether this finding was justified.

Neither the note nor the mortgage was in Fisher's possession. That he had been given authority to collect and receive the interest upon an overdue mortgage note would not without more tend to indicate that he was authorized to receive payment of the principal sum. Accordingly this was not of itself such conduct on the part of the defendants as would justify Simpson in believing that Fisher had the additional authority. *Biggerstaff* v. *Marston*, 161 Mass. 101, 104. *Murphy* v. *Barnard*, 162 Mass. 72, 77, *et seq.* This doctrine has been sustained in other jurisdictions in a great number of decisions which have been collected by the industry of the defendants' counsel, to which it is not necessary now to refer.

The testimony that Fisher had collected an instalment of the principal due upon another note held by one of the defendants and a third party had no bearing. It was not known to Simpson, and could not have influenced his mind at all. He could not justify his belief by reason of a fact of which he was ignorant.

In *Fitzgerald* v. *Beckwith*, 182 Mass. 177, the mortgagee had authorized his agent to receive payments of both principal and interest, and set up only a subsequent limitation of this authority, of which no notice had been given to the mortgagor. In *Doyle* v. *Corey*, 170 Mass. 337, the mortgagee had known of previous payments of principal made to her agent and indorsed upon the note without any objection from her. Neither of these cases is applicable here.

Fisher was in no sense the general agent of either of the defendants, nor had he been held out as such by either of them; and it was not necessary to bring home to Simpson notice of any limitation of Fisher's authority.

The testimony of Mrs. Eastman was admitted *de bene esse*, and was finally excluded. It cannot now be considered. It

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was incompetent as being a private conversation between husband and wife.* This is not now disputed.

It is not worth while to go further into detail. We have been all over the evidence, and have weighed with care the suggestions made by the plaintiff's counsel in argument. We find no evidence to justify a finding that either of the defendants held out Fisher as having a general agency about this note and mortgage, or a particular authority to receive payment of the principal. The defendant's exception to the refusal of the judge to give their first request for rulings must be sustained.

So ordered.

BALTIC MINING COMPANY *vs.* COMMONWEALTH.

Suffolk. December 1, 2, 1910. — January 4, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Constitutional Law, Interstate commerce. *Corporation*, Foreign: taxation. *Tax. Statute*, Construction. *Words*, "Foreign corporations."

A corporation, which was organized under the laws of Michigan for the purpose of mining, producing and selling copper and which operates in Michigan a mine and plant for the mining, producing, smelting and refining of copper and sells its product exclusively through another corporation organized in New Jersey for delivery to persons residing in Massachusetts and the other States and in foreign countries, not more than five per cent of the sales being consummated in Massachusetts, and which maintains in this Commonwealth a usual place of business consisting of an office in Boston for the use of its president and treasurer and for the general financial management and direction of its affairs, for meetings of its board of directors and for the transfer of its stock, is not so engaged in interstate commerce as to preclude this Commonwealth from levying upon it an excise tax and providing that the collection of such tax may be enforced by restraining the further prosecution of the business of the corporation in this Commonwealth. *Attorney General* v. *Electric Storage Battery Co.* 188 Mass. 239, followed; and *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, and *Pullman Co.* v. *Kansas*, 216 U. S. 56, distinguished.

It is not to be inferred that the Legislature intended that St. 1909, c. 490, Part III. §§ 39, 56, imposing an excise tax upon the foreign corporations described in St. 1903, c. 437, § 58, should go beyond the constitutional authority of the Commonwealth and levy a tax upon a foreign corporation having a usual place of busi-

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* It appeared in evidence that the witness's husband had died before the suit was brought.

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ness within this Commonwealth and conducting here as its principal function some kind of interstate commerce.

St. 1909, c. 490, Part III. §§ 39, 56, imposing an excise tax upon the foreign corporations described in St. 1908, c. 437, § 58, is inapplicable to a foreign corporation, for the taxation of which there is no special provision in our statutes and which is engaged in conducting some kind of interstate commerce for hire as its principal function and at the same time is engaged in intrastate business so closely connected with the interstate commerce that it could not be given up without serious detriment to the interstate commerce.

PETITION, filed on August 18, 1910, under the provisions of St. 1909, c. 490, Part III. § 70, to recover the amount of an excise tax assessed upon and paid by the petitioner, a foreign corporation.

The case was heard by *Rugg*, J., upon an agreed statement of facts, which was in substance as follows:

The petitioner is a foreign corporation with an authorized capital stock of $2,500,000, established under the laws of Michigan for the purpose of mining, producing and selling copper. Its mine and plant are situated in Michigan, where it is actually engaged in the business of mining and producing copper at its mine. No copper is sold directly by the petitioner itself. Its copper, after being mined, produced, smelted and refined in Michigan, is marketed and sold exclusively by a selling agency, the United Metals Selling Company, a New Jersey corporation. The copper is sold by the United Metals Selling Company for delivery to purchasers and consumers residing in Massachusetts and other States and foreign countries, delivery being effected by transportation from the smelter in Michigan directly to the purchaser in Massachusetts or elsewhere. Not more than five per cent of the sales are consummated in Massachusetts, the larger part of them being consummated in New York. The sales for delivery in and throughout the several States of the United States and in foreign countries are made in New York.

The petitioner several years ago was admitted to do business in this Commonwealth, pursuant to the provisions of St. 1903, c. 437, §§ 58 and 60, and since its admission has continued to do business within the Commonwealth and has complied with the requirements of the corporation law. It maintains, and has for several years maintained, a usual place of business within this Commonwealth, consisting of an office in the city of Boston

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for the use of its president and treasurer for meetings of its board of directors and for the transfer of its stock, and for the general financial management and direction of the company's affairs.

On June 16, 1910, the petitioner complied with the provisions of St. 1909, c. 490, by paying to the Commonwealth an excise tax of one-fiftieth of one per cent of the par value of its authorized capital stock, as stated in its annual certificate of condition filed under the provisions of the same statute. The tax amounted to $500, which sum, with interest, it now seeks to recover.

The petitioner contended that the statute under which the tax was assessed and paid is unconstitutional, because it constitutes an unlawful regulation of interstate commerce, denies the petitioner an equal protection of the laws, and deprives it of its property without due process of law by imposing a tax upon property beyond the jurisdiction of the Commonwealth; and that, therefore, the tax was illegally assessed, imposed and exacted.

The single justice ordered the petition dismissed, and at the request of the petitioner reported the case for determination by the full court.

C. A. Snow, (*J. H. Knight* with him,) for the petitioner.

D. Malone, Attorney General, & *A. Marshall*, Assistant Attorney General, for the Commonwealth.

KNOWLTON, C. J. This is a petition in equity, brought under the St. 1909, c. 490, Part III. § 70, for an abatement of an excise tax of $500 paid by the petitioner under § 56 of this chapter. The petitioner's contention is that the statute under which the tax was imposed is in violation of the Constitution of the United States.

The question presented is the same that was decided by this court, after full consideration and the citation of many authorities, in *Attorney General* v. *Electric Storage Battery Co.* 188 Mass. 239, when it was held that the statute was constitutional. Since this decision the cases of *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, and *Pullman Co.* v. *Kansas*, 216 U. S. 56, have been decided by the Supreme Court of the United States, in which it was held that a statute of Kansas imposing a tax

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upon foreign corporations was unconstitutional. The petitioner contends that these cases require us to overrule our former decision. In the first of the two cases the decision was by five of the nine justices, the other four dissenting. In the decision of the second some of the justices did not participate, but those who took part were divided in opinion as in the first case. The question before us is whether the law laid down by the majority of the Supreme Court of the United States shows that the excise tax in the present case was unlawfully imposed.

When we considered the statute in the former case we held that it was inapplicable to corporations that maintain a place of business within the Commonwealth only for interstate commerce, and the opinion recognized the fact that no corporation or individual could be prevented from engaging in interstate commerce within the Commonwealth, by ordering that the injunction against the defendant, forbidding the prosecution of its business so long as it disobeyed the law, should except so much of its business as was a part of interstate commerce. The statute was construed as contemplating only this kind of an injunction.

It becomes necessary to consider the substance of the law established by the two decisions of the Supreme Court, in its application to a case like the present. In each of the cases three opinions were written, one by Mr. Justice Harlan and one by Mr. Justice White, these two concurring in the judgment of the court, and one by Mr. Justice Holmes, dissenting. We do not understand that the majority of the court intended to change the law laid down in former decisions; but the difference of opinion among the justices seems to have arisen chiefly from their different views of the two cases then before the court, as to the effect of the proper application to them of established rules of law.

We understand that the majority agree in the following views: A State may impose any terms it chooses as a condition of permitting a foreign corporation to do business in it, so long as it does not deprive the corporation of any rights secured to it by the Constitution of the United States. Subject to this limitation of its power, a State may arbitrarily prevent any foreign corporation from doing business within it. To every person and corporation, the right of engaging in interstate

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commerce in every State, subject only to regulation of the business by Congress, is secured by the Constitution of the United States. States can pass no laws for the direct regulation of interstate commerce, although under the police power they may legislate in the public interest in any matter of local concern upon which there is no congressional legislation, even though the State's action affects interstate commerce indirectly and incidentally. The courts will look through the form of legislation to ascertain its true meaning and effect. In the two cases before the court, in which the statute purported to require a fee only in reference to the privilege of engaging in local business within the State, the question was whether the enforcement of the statute would directly interfere with interstate commerce and impose a burden upon it, so that, in substance and effect, the statute was different from the purport of the form of its language.

We understand that the court regarded the functions of each of the corporations as such that, practically, it could not give up its business within the State, for the prosecution of which the fee was exacted, without a very great injury to its interstate business, because the two classes of business were so connected that it was very difficult if not impracticable to separate them, and that therefore the State could not arbitrarily deprive these two corporations of the privilege of doing a local business without inflicting great wrong upon them by diminishing or destroying the interstate business that each of them had a right to do. As against each of these two corporations, carrying on the business for which they were respectively incorporated, the State had not an arbitrary right to impose such a burden on the local business as practically would compel it to abandon its interstate business. Looking then to the question whether the fee charged for the privilege of doing the local business was lawful as a reasonable tax or demand for the benefit conferred, the court held that, as against corporations like these, the mode of determining it showed it to be unreasonable, and therefore unwarrantable.

The corporation before us in the present case is of a very different kind, and the legislation of this Commonwealth differs much from that of Kansas. No such question as that considered in *Western Union Telegraph Co.* v. *Kansas*, *ubi supra*, could arise

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under our statutes in reference to the taxation of a telegraph company or a railroad company. Upon such companies an excise tax is imposed, determined by taking a part of their capital stock proportioned to the length of their lines in this Commonwealth, as compared with the length of all their lines. St. 1909, c. 490, Part III. §§ 40, 41, 43, 52, 72.

The taxation in question in this case is only that upon foreign corporations. §§ 54, 56. The term "foreign corporations" means those established under laws other than those of this Commonwealth, for purposes for which domestic corporations may be organized under the provisions of St. 1908, c. 437, § 7. St. 1903, c. 437, § 56. These are corporations formed for any lawful purpose which is not excluded by the provisions of § 1 of this chapter, with certain named exceptions. Those excluded under § 1 are banks, savings banks, co-operative banks, trust companies, surety or indemnity companies, safe deposit companies, insurance companies, railroad or street railway companies, telegraph or telephone companies, gas or electric light and heat or power companies, canal, aqueduct or water companies, cemetery or crematory companies, and all corporations which now have or may hereafter have the right to take or condemn land, or to exercise franchises in public ways, granted by the Commonwealth or by any county, city or town. The foreign corporations which are subject to taxation under St. 1909, c. 490, Part III. § 56, in the manner in which the petitioner was taxed, are those having a usual place of business in this Commonwealth, or engaged permanently or temporarily, and with or without a usual place of business therein, in the construction, erection, alteration or repair of a building, bridge, railroad, railway or structure of any kind, except those for the taxation of which special provision is made. St. 1903, c. 437, §§ 58, 60. Express provision is made for the taxation of express companies, foreign and domestic. See St. 1909, c. 490, Part III. §§ 72, 76.

It is not the policy of our law, in dealing with corporations, foreign or domestic, whose purpose is to furnish an agency for the transaction of commercial business by making transfers for pay, through transportation or the transmission of intelligence from state to state, as well as in a single State, to impose a tax estimated upon the basis of earnings or property in other States.

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Our statutes relative to the taxation of railroad, telegraph and express companies illustrate our methods.

The plaintiff corporation is not of the same class as a telegraph company or the Pullman Company. It is a mining company. Its business is mining copper and preparing it for the market. It is a producer of a valuable commodity. If it is not in a strict sense a manufacturing corporation, it is like one. It has no more connection with interstate commerce than other manufacturing corporations that prepare property for sale in the market. The sale of its product in different States and the transportation of it from one State to another are mere incidents of the business of producing it for sale. Seemingly this corporation derives little if any profit from that part of its business which is strictly interstate commerce. The profit from transportation goes to the carriers. The difference between the price of copper sold and delivered at a place remote from the mine and that of copper sold at the mine is presumably the sum paid for carrying it. It is agreed that about five per cent of the plaintiff's sales of copper have been made in Massachusetts, for delivery here. If a profit is derived from the business of negotiating sales and making deliveries in States remote from the mine, it seems that this goes, for the most part or altogether, to the United Metals Selling Company, a corporation having its offices in New York City, to which the plaintiff granted an exclusive agency for the sale of its copper. It would be difficult, if not impossible, for the plaintiff to show that any considerable part of its income is derived from interstate commerce.

The plaintiff's regular place of business in Boston is not used in interstate commerce, as are passenger stations and freight houses of railroad companies. It is used as a home in Massachusetts for this foreign corporation, for the financial management and direction of the company's affairs, where the president and treasurer have their offices, and the meetings of the board of directors are held. It could be given up or removed to any other State without affecting in any way the plaintiff's income from interstate commerce. If there were an arbitrary exclusion of the plaintiff from the Commonwealth, except so far as it conducted the business of interstate commerce within the State, it would put no burden upon its commerce, either in Massachusetts

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or elsewhere. Whatever view be taken of this imposition of an excise tax, it is difficult to see how it has any direct relation to the petitioner's income from interstate commerce.

The required payment is strictly of an excise tax, and not of a tax upon property. The fact that it is estimated upon the par value of the capital stock; with a maximum limit of $2,000 as the highest tax that can be imposed upon the largest corporation, does not make it a tax upon property. *Attorney General* v. *Bay State Mining Co.* 99 Mass. 148. *Commonwealth* v. *Lancaster Savings Bank*, 123 Mass. 493, 495. *Pratt* v. *Street Commissioners*, 139 Mass. 559, 562. *Provident Institution* v. *Massachusetts*, 6 Wall. 611. *Hamilton Co.* v. *Massachusetts*, 6 Wall. 632. *Society for Savings* v. *Coite*, 6 Wall. 594, 608. This excise tax is for the commodity or privilege of having an establishment for business in Massachusetts, with the protection of our laws and the financial and other advantages of a situation here. *Attorney General* v. *Electric Storage Battery Co.* 188 Mass. 239, 240. Such a place of business has no necessary connection with the earning of profits in interstate commerce.

In *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, 33, Mr. Justice Harlan said: "It is true that in many cases the general rule has been laid down that a State may, if it chooses to do so, exclude foreign corporations from its limits, or impose such terms and conditions on their doing business in the State as in its judgment may be consistent with the interests of the people. But those were cases in which the particular foreign corporation before the court was engaged in ordinary business and not directly or regularly in interstate or foreign commerce." This is such a corporation.

In *Osborne* v. *Florida*, 164 U. S. 650, the court held that the imposition of a tax upon a corporation engaged in both intrastate and interstate commerce was legal, as the company could "conduct its interstate business without paying the slightest heed to the act, because it does not apply to or in any degree affect the company in regard to that portion of its business which it has the right to conduct without regulation from the State." The same condition exists here. If the plaintiff should choose to give up the advantages of a place of business in Boston, it might disregard the statute, and abandon its office or take the

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consequences of an injunction, without affecting in the slightest degree the profits derived from its interstate business, if it receives any. The opinion in *Pullman Co.* v. *Adams*, 189 U. S. 420, 422, contains this language: "The company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce." This is true in the light of the latest decisions, when the case is like the present, where the renunciation of a local business would not affect its interstate business. See also *Allen* v. *Pullman's Palace Car Co.* 191 U. S. 171.

The present case seems to be covered by the decision in *Horn Silver Mining Co.* v. *New York*, 143 U. S. 305. This plaintiff is just such a corporation as the present petitioner. It is called a manufacturing corporation. The argument in its behalf presented the question whether the statute was unconstitutional as an interference with interstate commerce. It seems to have been contended, if we may judge from the opinion, that the facts ought "to be considered as showing only transactions of interstate commerce." But the statute was held constitutional, notwithstanding that its relation to the interstate commerce conducted by that company was substantially the same as appears in the present case.

The plaintiff in *Pembina Consolidated Silver Mining & Milling Co.* v. *Pennsylvania*, 125 U. S. 181, seems to have been engaged in the same business, having the same relations to interstate commerce, as the present petitioner. The ground set up against the statute in the answer was that it was in violation of the commerce clause of the constitution. Mr. Justice Field said in the opinion of the court, at page 184, "It is not perceived in what way the statute impinges upon the commercial clause of the Federal Constitution. It imposes no prohibition upon the transportation into Pennsylvania of the products of the corporation, or upon their sale in the Commonwealth. It only exacts a license tax from the corporation when it has an office in the Commonwealth for the use of its officers, stockholders, agents, or employees." We have the following language, quoted by Mr. Justice Miller in *Western Union Telegraph Co.* v. *Massachusetts*, 125 U. S. 530, 550, from the opinion of the court, written by Mr. Justice Strong, in *Railroad Co.* v. *Peniston*, 18 Wall. 5, 30: "It cannot be that a State tax which remotely affects the effi-

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cient exercise of a Federal power is for that reason alone inhibited by the Constitution. To hold that would be to deny to the States all power to tax persons or property." Without referring to the many other cases in the Supreme Court of the United States that tend to support the contention of the Commonwealth, we hold that the recent decisions of that court, relied on by the petitioner, do not indicate that the statute before us is unconstitutional.

In our former adjudication upon it we expressed the opinion that it was inapplicable to cases where a foreign corporation had its place of business here only for use in interstate commerce. It is not to be inferred that the Legislature intended the statute to go beyond the constitutional authority of the Commonwealth. We have already referred to the policy of our law in reference to such corporations as railroads, telegraph companies, electric railways, express companies, and the like. In view of these legislative expressions of policy and in view also of the late decisions relied on by the petitioner, we hold that the statute before us would be inapplicable to a foreign corporation for the taxation of which there is no special provision in our statutes, if it should be engaged in the work of conducting some kind of interstate commerce for hire as its principal function, and at the same time should be engaged in intrastate business so closely connected with the interstate commerce that it could not be given up without serious detriment to the interstate commerce, so that its condition in this respect would be like that of the Western Union Telegraph Company.

Petition dismissed.

MARY E. MULREY & others *vs.* ANNA M. CARBERRY.

Suffolk. December 2, 1910. — January 4, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Equity Pleading and Practice, Bill of review. *Evidence,* Competency, Relevancy.

A bill in equity, filed by leave of court, sought a review of a suit brought against the plaintiffs to compel them to convey to the defendant certain land which had descended to them from their father, who was alleged to have procured it by a fraud upon the defendant, the review being sought because the judge who heard

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the original suit, after making a memorandum for a decree granting the prayers of the bill as against the plaintiffs in the bill of review, allowed the original suit to be reopened to admit another as party defendant therein and then after a further hearing dismissed the suit as to him, the plaintiffs in the bill of review alleging that the evidence which constituted the ground for such dismissal was such as would necessitate that the suit also should be dismissed as to the plaintiffs in the bill of review. At the hearing of the bill of review the plaintiffs were allowed to introduce in evidence a transcript of the proceedings at the hearing after the reopening of the original suit, which contained statements by the presiding judge substantiating the allegations of the bill of review. *Held*, that the evidence was competent and material, the bill not being confined to the correction of errors of law upon the face of the record but being one issued in the sound discretion of the court to permit the plaintiffs to show what occurred at and after the trial of the original suit which would entitle them to a reversal of the decree entered against them therein.

BILL IN EQUITY, filed in the Superior Court on April 10, 1910, in accordance with the rescript sent with the decision reported in 204 Mass. 378. The suit has been before this court on previous occasions, as described in the opinion and is reported in 192 Mass. 547 and 204 Mass. 378.

The bill in substance alleged that the defendant on August 21, 1902, had brought a suit in equity against the plaintiffs and one Thaddeus F. Mulrey seeking to have the plaintiffs convey to her certain real estate which had descended to them from their father, who was alleged by fraudulent acts as administrator of the estate of the defendant's uncle in 1879 to have procured it to be conveyed through a third person to himself; that in that suit an order for a decree was entered directing such a conveyance; that thereafter a brother of the plaintiffs, one John R. Mulrey, filed a petition to be admitted as party defendant, which was allowed, and that, after a further hearing, the bill was dismissed as to John R. Mulrey; that thereafter the plaintiffs procured the counsel for John R. Mulrey to act for them; that the reason that the bill was dismissed as to John R. Mulrey was because the judge found on the further hearing of the case after John R. Mulrey was admitted as party defendant in the original suit that the father of the defendants (the plaintiffs in this bill) had not misled the plaintiff in the original suit (the defendant herein) by any statements that he made or any acts that he did after the sale by him as administrator in 1879.

The bill of review was heard by *Pierce*, J., who admitted in evidence subject to exceptions by the defendant a transcript of

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the testimony introduced at the hearing before *Fessenden*, J., upon the reopening of the case after the filing of an order for a decree that the plaintiffs should convey the property to the defendant as above described and after the filing of the answer of John R. Mulrey which contained statements of the judge substantiating the allegations of the bill of review; and also evidence tending to show that the plaintiffs' present counsel was the counsel who had appeared originally only for John R. Mulrey, and had not been their counsel until after the defendant's suit had been dismissed as to John R. Mulrey.

The judge made an order for a decree in favor of the plaintiffs; and the defendant alleged exceptions.

J. F. Cronin, for the defendant.

P. H. Kelley, for the plaintiffs.

KNOWLTON, C. J. The story of this case was pretty fully told in *Mulrey* v. *Carberry*, 204 Mass. 378. That case was a petition for a bill of review, and it was decided by this court in favor of the petitioners. The present bill of exceptions is to rulings of law on the trial upon the bill of review, admitting in evidence the report of the proceedings at the trial in the original suit, made by an official stenographer of the Superior Court, and other kindred matters of proof.

The petition for a bill of review was addressed to the discretion of the court, and was founded upon matters that did not appear of record in the Superior Court after the hearing before the justice who made the decision. The defendants in the original suit appealed from the decree, and afterwards, when they were about to present to this court the record of the proceedings, they discovered that the stenographer who was appointed a commissioner to take the testimony at the original hearing, and whose report would be for that reason a part of the official record, did not take the testimony at a subsequent hearing which was important to the rights of the defendants, and that another stenographer then acted in his place. As a result, a part of the proceedings, which was reported by this stenographer, was not a part of the record in the case. The defendants moved to have this stenographer appointed a commissioner *nunc pro tunc*, but the motion was denied, and the defendants appealed. As the case first came to this court (see 192 Mass. 547) it did not

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appear that there was any error of law in the proceedings, nor was it shown that there was any error of fact that required a reversal of the decree.

Upon the petition for a bill of review, the petitioners averred facts which, for the purposes of the hearing, were admitted by the respondents to be true, and which showed that the decree was founded on an error of law. These facts did not appear of record, and they did not relate to matters which ought to have been put in evidence but were not. They related to proceedings before the court, and to matters that ought to have appeared in the record, but did not. The only question of doubt, that arose upon the petition for a bill of review, was whether the failure to protect the rights of the original defendants and have the record show all the material facts was so far imputable to negligence of their counsel as to make it improper to grant their petition. Upon a consideration of this question the decision of the court was, that the omission resulted from an oversight and mistake, which ought not to prevent the defendants from showing, upon a bill of review, what the proceedings were at the hearing.

The mistake of the counsel of the defendant, in the present proceeding, is in treating this as a bill to correct errors of law upon the face of the record, which the plaintiffs might prosecute as a matter of right, instead of a bill issued in the sound discretion of the court, upon a petition to permit the plaintiffs to show what occurred at and after the trial that prevented them from presenting the questions of law on their original appeal. This distinction sufficiently appears in *Elliott* v. *Balcom*, 11 Gray, 286, *Richardson* v. *Lloyd*, 99 Mass. 475, and 16 Cyc. 524–534. The principle applicable in the present case is the same as that which governs bills of review founded on newly discovered evidence. The evidence objected to was rightly admitted. R. L. c. 175, § 68. *Mulrey* v. *Carberry*, 204 Mass. 378.

Exceptions overruled.

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M. STEINERT AND SONS COMPANY *vs.* GEORGE F. TAGEN & others.

Suffolk. December 2, 1910. — January 4, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Labor Union. Equity Pleading and Practice, Report. *Equity Jurisdiction*, To enjoin wrongful and malicious act. *Evidence*, Presumptions and burden of proof.

In a suit in equity by an employer of labor against officers and members of a labor union, where a material question was whether a certain strike, begun on a May 2, had ended before the following October 14, the judge who heard the case reported to this court his finding of the following facts: The strike was declared May 2. Eleven men left the plaintiff's employ and a few days thereafter the plaintiff secured men to take their places and thereafter continued with a force which was adequate and as large as he desired. Of the eleven who left the plaintiff's employ, eight at once secured new employment in the same city and three left the Commonwealth. A short time after the strike began an international organization, with which the striking union was affiliated and which at first had aided it, ceased to do so. *Held*, that the strike was over on October 14.

Upon the report under R. L. c. 159, § 29, to this court by a judge of the Superior Court of the facts and questions of law arising in a suit in equity, this court may draw such inferences from the facts found in the report as are reasonably to be made from and are not inconsistent with any of the facts reported.

The members of a teamsters' labor union, more than four months after a justifiable strike against an employer of teamsters in a city has ended, cannot lawfully drive about the streets of the city a wagon bearing initials indicating the name of the union and placards stating "The union teamsters are on strike for hours and wages" at such employer's place of business.

An employer of labor may maintain a suit in equity to enjoin officers and members of a labor union from driving about the streets of a city containing the employer's place of business, more than four months after a strike which had been declared against the employer had ended, wagons bearing initials indicating the name of the union and placards stating, "The union teamsters are on strike for hours and wages" at such employer's place of business, although he is unable to prove the existence of any loss occasioned by such acts, the acts sought to be enjoined being unjustifiable and manifestly intended merely to injure the plaintiff.

BILL IN EQUITY, filed in the Superior Court on October 20, 1910, seeking to enjoin the defendants, officers and members of the "Piano and Furniture Movers and Helpers, No. 343," from certain alleged illegal acts hereinafter more particularly described.

The case was heard in the Superior Court by *Richardson*, J., who reported it to this court for determination. The report contained the following findings:

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"The plaintiff is a corporation engaged in the sale and moving of pianos. It has a place of business in Boston on Boylston Street on the corner of Carver Street. The front of the building and salesrooms face on Boylston Street and the side of the building and workshops face on Carver Street. It also has stores in other cities in the Commonwealth.

"All the defendants are members of a certain voluntary association called 'Piano and Furniture Movers and Helpers Union 343' which is a labor union and affiliated with the International Brotherhood of Teamsters and the American Federation of Labor. The defendant Tagen is president of said association, the defendant Smith is treasurer and the defendant Bryson is secretary thereof. The defendant Corliss, though formerly vice-president of said association, is not now an officer thereof, but is still a member.

"The plaintiff employed a number of teamsters for the delivery of pianos to purchasers and for moving pianos belonging to its customers from place to place and all of these teamsters were members of said union. In April, 1910, the union to which the defendants belonged endeavored to secure an increase in wages for the teamsters employed by the plaintiff and shorter hours of labor and failing to do so, on May 2, 1910, declared a strike. The teamsters, eleven in number, at once ceased work. The plaintiff within a few days secured men to take their places and has had since then and has now an adequate force and is not seeking any new men. After a short while the International Brotherhood of Teamsters ceased to aid the strikers any further on account of an alleged failure of the union to comply with the regulations (which were not shown to have been broken) of the Brotherhood in calling the strike and the strikers sought other employment. Of the eleven men who struck eight at once secured positions in Boston as piano movers or teamsters and have continued in such employment and the other three have left the State.

"On October 14, 1910, the defendant Tagen, acting in pursuance of a vote of the union, hired a horse and wagon and attached strips of canvas to the rear and sides of the wagon. The canvas strip on each side of the wagon bore the following inscription in conspicuous letters six inches high:

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"'The union teamsters are on strike for
hours and wages at the following places:
Hunter & Ross, Haymarket Place.
M. Steinert & Sons Co., 162 Boylston St.'

On the rear of the wagon was the following inscription:

"'I. B. of T.
A. F. of L.'

"The defendant Tagen employed the defendant Kelley to drive this wagon with the above inscriptions through the streets of Boston every day for one week passing in front of the plaintiff's place of business and through Carver Street once each day and twice on one day in sight of the place where the teamsters of the plaintiff when not in actual service congregated and generally throughout the city and the defendant Kelley so drove it. No crowds followed the wagon, or assembled in front of the plaintiff's store, and no attempt other than by the use of this wagon was made by the defendants, or other members of the union or their sympathizers to interfere with the plaintiff or to intimidate its employees. The plaintiff offered no evidence that any of its employees had left its employment or that any person had refrained from patronizing it on account of the display of these signs."

P. Nichols, for the plaintiff.

F. W. Mansfield, for the defendants.

SHELDON, J. The strike of the plaintiff's employees in May was for the purpose of obtaining higher wages and shorter periods of labor. It was a justifiable strike. *L. D. Willcutt & Sons Co.* v. *Driscoll*, 200 Mass. 110, 113, 114, 130. It does not appear to have been carried on in any respect in an unlawful manner or by the use of any unfair coercion or wrongful means. Nor could we say that the particular act charged in the bill to have been done by the defendants would be in itself an unlawful means of publishing the fact that a strike was going on. There was no picketing, no blocking of the streets, no actual interference with the plaintiff or with the men whom it employed in place of the strikers. We see nothing more than an attempt to inform the public, including probable applicants for work with the plaintiff, of the fact of the pending strike. Even if this were before doubtful, we could not now condemn it, in view of

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the provisions of St. 1910, c. 445, which imposed upon the plaintiff while the strike lasted the duty to give this information to any persons whom it solicited to take the place of the strikers. Of course, what we have said would not be applicable to a case presenting different circumstances from those which existed here, such as appeared for example in *Plant* v. *Woods*, 176 Mass. 492; *Vegelahn* v. *Guntner*, 167 Mass. 92; *Sherry* v. *Perkins*, 147 Mass. 212, and similar cases.

But in the case at bar the strike was over. Although this fact was not expressly found in the Superior Court, in our opinion it is necessarily to be inferred from the facts which are found, and must be taken to be a fact. *Knowles* v. *Knowles*, 205 Mass. 290, 294. The strike was declared May 2, 1910. The plaintiff within a few days secured men to take the places of the strikers, has had ever since an adequate force, and is not seeking any new men. Of the eleven men who left the plaintiff's employ, eight soon secured and still have new employment in the same kind of work as before, and three have left this Commonwealth. Moreover a short time after the strike began, the International Brotherhood of Teamsters, the organization with which the defendants' labor union was affiliated, ceased to aid the strikers any further. It is difficult to imagine a case, short of a formal agreement of both parties, in which it could be more manifest that a strike had come to an end.

The defendants' act in driving the wagon through the streets with the placards complained of began on October 14, 1910, long after the end of the strike, and has since been continued. We can see no justification of it. It is a false announcement, not adapted in any way to benefit the defendants or their union, but likely to embarrass the plaintiff whenever it may need to employ additional men. It manifestly was intended merely to injure the plaintiff. This shows that it was done maliciously within the legal meaning of that word. *McGurk* v. *Cronenwett*, 199 Mass. 457, 461, 462. The law will give a remedy for such an act. *Martell* v. *White*, 185 Mass. 255, 257. *Hartnett* v. *Plumbers' Supply Association*, 169 Mass. 229.

The case does not come within the doctrine that equity will not enjoin the publication of a libel. There is here a wrongful act maliciously done, continuing and repeated day by day, which,

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although it is not shown to have caused as yet any damage to the plaintiff, is manifestly intended to produce that result, is liable at any time in the future to do so, and may cause real and substantial damage of which it would be certainly difficult and might be impossible to prove either the existence or the *quantum* of loss. It is like a boycott declared and maintained without cause. In such a case equity will give relief. This is the real doctrine of many of our own decisions. *Sherry* v. *Perkins*, 147 Mass. 212. *Vegelahn* v. *Guntner*, 167 Mass. 92. *Plant* v. *Woods*, 176 Mass. 492. *Pickett* v. *Walsh*, 192 Mass. 572. *Beekman* v. *Marsters*, 195 Mass. 205. *L. D. Willcutt & Sons Co.* v. *Driscoll*, 200 Mass. 110. *Davis* v. *New England Railway Publishing Co.* 203 Mass. 470. The same principle has been maintained in other courts. *Emack* v. *Kane*, 34 Fed. Rep. 46. *Lewin* v. *Welsbach Light Co.* 81 Fed. Rep. 904. *A. B. Farquhar Co.* v. *National Harrow Co.* 102 Fed. Rep. 714. *Dittgen* v. *Racine Paper Goods Co.* 164 Fed. Rep. 85. *National Life Ins. Co.* v. *Myers*, 140 Ill. App. 392. *Gilbert* v. *Mickle*, 4 Sandf. Ch. 357. *Brace* v. *Evans*, 35 Pittsb. L. J. 399. *Murdock* v. *Walker*, 152 Penn. St. 595. *Barr* v. *Essex Trades Council*, 8 Dick. 101. *Beck* v. *Railway Teamsters' Protective Union*, 118 Mich. 497.

A decree must be entered giving to the plaintiff the relief prayed for.

So ordered.

JOHN B. KELLY *vs.* MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

CHRISTOPHER P. KELLY *vs.* SAME.

Middlesex. December 9, 1910. — January 4, 1911.

Present: MORTON, HAMMOND, LORING, & SHELDON, JJ.

Insurance, Life: misstatements in application.

At the trial of an action upon a policy of insurance upon the life of a woman, it appeared that the insured signed for the defendant's medical examiner a statement containing a negative answer to the question, "Have you ever had gravel, bladder or kidney disease?", and that a little more than four months before she had been treated for Bright's disease of the kidneys in some form. There was

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evidence tending to show that she was not told that she had Bright's disease in any form, and also evidence that the form of Bright's disease that she then had was acute, which was curable, that after being at the hospital about two months she was discharged as "improved" and resumed her occupation, which was the care of a large boarding house where she did all the cooking, and that she continued at her occupation for over two years without interruption by sickness, when she was taken ill and died of "nephritis complicated with diabetes." By the terms of the policy, if the answer to the medical examiner's question was a misrepresentation and either was made with actual intent to deceive, or was as to a matter which increased the risk of loss, there could be no recovery upon the policy. The presiding judge ordered a verdict for the defendant on the ground that the insured had made a misrepresentation which as a matter of law increased the risk of loss. The plaintiff alleged exceptions. *Held*, that the questions, whether the disease with which the insured was afflicted before she made the statement in question was the acute or chronic form of Bright's disease, and whether, if acute, it increased the risk of loss, were for the jury, and that the exceptions must be sustained.

TWO ACTIONS OF CONTRACT by two beneficiaries under a policy of life insurance upon the life of Margaret E. Kelly. Writs dated June 16, 1908.

In the Superior Court the cases were tried before *Hardy*, J.

It appeared that the insured was engaged in the business of conducting a large boarding house in Lowell containing about forty boarders, and that on June 21, 1905, she signed a certificate for the defendant's medical examiner, which was attached to her application for the policy in suit, in which she stated that she never had had "gravel, bladder or kidney disease"; that nine months before she had consulted her physician for "debility," which had lasted for four weeks, of which there were no "remaining effects," that she "kept about business as usual."

There also was evidence which tended to show that on January 4, 1905, the insured consulted her physician who advised her to go to the Lowell Hospital, where she was treated for Bright's disease of the kidneys: that he never told her from what she was suffering, and that she was not told at the hospital. There was expert testimony that she was suffering from acute Bright's disease, which was curable. On March 15, 1905, she was discharged from the hospital, "improved," and thereafter resumed her care of the large boarding house, where she did all the cooking, which occupation she continued until her last illness without interruption by sickness. A physician, testifying as an expert, gave it as his opinion that on June 21,

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1905, when the insured made the statement attached to her application, she could have been in sound health. On April 29, 1907, the insured again summoned her physician, who directed her removal to the hospital on May 6, 1907, where she died two days later of "nephritis, complicated with diabetes."

At the close of the evidence, the presiding judge ordered a verdict for the defendant "on the ground that the answer 'No' to the question . . . 'Have you ever had gravel, bladder or kidney disease?' was a misstatement which as a matter of law increased the risk of loss"; and the plaintiff alleged exceptions.

J. Joseph O'Connor, (*J. J. O'Sullivan* with him,) for the plaintiffs.

G. Hoague, for the defendant.

HAMMOND, J. It does not seem to be disputed that Margaret E. Kelly, upon whose life the policy was issued, suffered from some kind of Bright's disease and was treated therefor; that this occurred only a few months before she applied for the policy; and that her negative answer to the inquiry of the defendant's medical examiner as to whether she had ever had "gravel, bladder or kidney disease" was false. By the terms of the policy this misrepresentation is fatal to the validity of the policy if it was made with actual intent to deceive, or if it was as to a matter which increased the risk of loss. R. L. c. 118, § 21. The trial judge seems to have been of the opinion that the kidney trouble with which she was afflicted before the application increased the risk of loss, and upon that ground ordered in each case a verdict for the defendant.

"Some diseases or bodily conditions are of such a nature that the question whether they increase the risk of loss is for the jury. Rupture was said to be of that class in *Levie* v. *Metropolitan Ins. Co.* 163 Mass. 117. On the other hand, there are conditions and diseases of a nature which require it to be held, as matter of law, that a misrepresentation as to them is one as to a matter which increases the risk of loss, within the meaning of the statute. That the applicant was addicted to the excessive use of intoxicating liquors was held to be such a matter in *Rainger* v. *Boston Mutual Life Association*, 167 Mass. 109." Barker, J., in *Brown* v. *Greenfield Life Association*, 172 Mass. 498, 503, in which case it was held that "consumption" in-

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creased the risk of loss. See also *Dolan* v. *Mutual Reserve Fund Life Association*, 173 Mass. 197. Generally, however, the question whether the disease is such as to increase the risk of loss is for the jury. See in addition to cases before cited *Hogan* v. *Metropolitan Life Ins. Co.* 164 Mass. 448; *Coughlin* v. *Metropolitan Life Ins. Co.* 189 Mass. 538; *Barker* v. *Metropolitan Life Ins. Co.* 198 Mass. 375.

There was evidence that the disease which Mrs. Kelly had before the application was an acute form of Bright's disease; that that form of the disease is curable; that at the time she applied for this insurance she had fully recovered and for many months appeared to be well, and performed hard manual labor.

Upon the whole evidence, including the testimony of the physicians, the questions, whether the disease she had was the acute or chronic form of Bright's disease, and whether, if acute, it increased the risk of loss, were for the jury. Nor do we see any ground upon which the order directing verdicts for the defendant can be sustained.

Exceptions sustained.

WILLIAM M. VERMILYE *vs.* WESTERN UNION TELEGRAPH COMPANY.

Suffolk. November 16, 17, 1910. — January 5, 1911.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Telegraph. Corporation, Rules of. *Practice, Civil*, Exceptions. *Constitutional Law*, Interstate commerce, Police power.

Vermilye v. *Postal Telegraph Cable Co.* 205 Mass. 598, affirmed.

In an action against a telegraph company under R. L. c. 122, §§ 9, 10, for wrongfully refusing to transmit for the plaintiff a telegram written upon a blank of the defendant to which the plaintiff had attached a small sticker containing a notice that the message was a business one and that a failure to deliver it promptly would cause the sender financial loss, the defendant relied on the following rule: "Messages to be on message forms. Each message for transmission will be written upon the form provided by the company for that purpose, or will be attached to such form by the sender or by the person presenting the message as the sender's agent, so as to leave the printed heading in full view above the message." It appeared that the plaintiff had no knowledge of the rule when he presented his message, that the rule was in a tariff book, which was open to the public in the defendant's office but which the defendant otherwise did nothing to call to the attention of the public. Inspection of the traffic book

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showed that the rule quoted above was a rule of the receiving department and was intended for the use and guidance of the company's agents and not for the public. The judge, who tried the case without a jury, found as facts, that the presence of the sticker on the telegram blank had no tendency to confuse the defendant's operator or to increase the probability of error or delay in transmitting the message, and that it did not obscure the printed heading above the message. The defendant contended that the rule forbade the sender of a message to put anything upon the face of the blank except the message, the date, and the name and address of the person to whom it was to be sent, and that the sticker and notice attached to the plaintiff's telegram were in violation of the rule. The defendant offered testimony that the defendant and its agents always had put this construction on the rule. The judge excluded the testimony and ruled that the construction put upon the rule by the defendant and its agents did not affect the rights of the plaintiff. He found as a fact that the rule was not intended for the public and ruled that it did not have the meaning which the defendant contended for, and that it was not a justification for the defendant's refusal to transmit the message. *Held*, that the findings of the judge were justified and that his rulings were correct; that the defendant's construction of the rule was immaterial, and that, even if the rule could have affected the plaintiff who had no knowledge of it, it merely required that messages should be written upon the forms provided for the purpose and did not forbid the writing or pasting of any other unobjectionable matter upon the same paper in such a way as not to mislead the defendant's agents or cause them inconvenience in the performance of their duties.

In an action against a telegraph company under R. L. c. 122, §§ 9, 10, for wrongfully refusing to transmit a telegram, the defendant at the trial did not ask for any ruling that the statute was unconstitutional as a regulation of interstate commerce and this question seemed not to have been brought to the attention of the judge or to that of the plaintiff's counsel, but the defendant asked the judge to rule that "the defendant cannot be held liable under R. L. c. 122, § 9, for refusal to receive and transmit the message in question under the circumstances under which it was presented." This ruling was refused by the judge and the defendant excepted, and this court, against the plaintiff's contention, treated the question of the constitutionality of the statute as open under this exception.

Although it is settled, that telegraph lines extending through different States for use in the ordinary way are instruments of commerce, and that messages passing over them from one State to another in the transaction of business are a part of interstate commerce that is entitled to the protection of the Constitution of the United States, yet it also is well settled, that a statute like R. L. c. 122, § 9, requiring a telegraph company to receive despatches upon payment of the usual charges according to the regulations of the company and to transmit them faithfully and impartially, so long as Congress has passed no law upon the subject, is not a regulation of interstate commerce within the meaning of the constitutional provision, but is a proper police regulation for the enforcement of the rules and policy of the common law, which affects interstate commerce only incidentally.

R. L. c. 122, § 9, is not unconstitutional as a regulation of interstate commerce.

TORT against a telegraph company for a refusal to accept from the plaintiff for transmission at the ordinary rates a mes-

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sage to which he had attached a certain printed notice unless he would remove such notice from the message, the declaration containing three counts, the first at common law, the second under R. L. c. 122, § 9, for damages, and the third under §§ 9, 10, of that chapter to recover the penalty or forfeiture provided for by § 10. Writ dated May 8, 1908.

In the Superior Court the case was tried before *Schofield*, J., without a jury. The judge found for the plaintiff on all three counts, requiring the plaintiff to elect between counts one and two, on each of which nominal damages in the sum of $1 were awarded. On count three the judge ordered that the defendant should forfeit to the plaintiff the sum of $50. The defendant alleged exceptions, raising the two questions not previously disposed of which are stated in the opinion.

The notice, mentioned in the opinion, which was printed on a small sticker attached by the plaintiff to the blank form of the defendant on which the plaintiff's message was written, was as follows: "Notice is hereby given that this is a business message, and that failure to deliver it promptly and correctly is likely to cause the sender financial loss. Further particulars will be furnished if desired on application to the sender at 116 Bedford Street, Boston."

The plaintiff, when he presented his message, tendered a sum of money sufficient to pay the charges for its transmission as an unrepeated message. When the message was presented to the clerk of the defendant at its office on Bedford Street, she said that she must see the manager, and the manager then stated to the plaintiff that the message could not be accepted with that notice attached, and that it was refused by instructions from headquarters. The only reason given by the defendant's manager or clerk for refusing to transmit the message was that the sticker was attached. The plaintiff was informed at the time that without the sticker the message would have been transmitted upon payment of the usual charges.

The facts material to the rulings and findings of the judge in regard to the rule of the defendant quoted in the opinion are there stated.

The sections of R. L. c. 122 mentioned above are as follows:

"Section 9. A telegraph company shall receive despatches

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from and for other telegraph companies and associations, and from and for any person; and, upon payment of the usual charges for transmitting despatches according to the regulations of the company, shall transmit them faithfully and impartially.

"Section 10. A telegraph company shall receive, compute and transmit despatches which may be received at its offices from another telegraph company or by mail, at the same rates of charge as for despatches which may be received for transmission from individuals on the same day and at the same place. A telegraph company which wilfully neglects or refuses to comply with the provisions of this or the preceding section shall forfeit not more than one hundred dollars to the company or person who sends or desires to send the despatch."

A. Lord, for the defendant.

O. O. Partridge, for the plaintiff.

KNOWLTON, C. J. This action was brought by the same plaintiff and tried at about the same time as *Vermilye* v. *Postal Telegraph Cable Co.*, reported in 205 Mass. 598, and it is almost identical with that case in its facts, and in the findings and rulings of the Superior Court. The only questions raised by the defendant's exceptions in this case that are not covered by our decision in the other are two: one as to the effect of a certain rule of the defendant, and the other as to the constitutionality of the R. L. c. 122, §§ 9, 10, in their application to a telegraph company that transmits messages in connection with interstate commerce.

The rule relied on by the defendant is as follows: "Messages to be on message forms. Each message for transmission will be written upon the form provided by the company for that purpose, or will be attached to such form by the sender or by the person presenting the message as the sender's agent so as to leave the printed heading in full view above the message." The plaintiff had no knowledge of this rule when he presented the message. It was in a tariff book which was open to the public in the defendant's office, but the company did nothing to call the attention of the public to the book, beyond leaving copies of it in its office. The defendant contended that the rule forbade the sender of messages to put anything upon the face of the blank but the message, the date, and the name and address of the

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person to whom it is to be sent, and that the "sticker" and notice attached to the plaintiff's telegram were in violation of this rule. Witnesses for the defendant were in court ready to testify that the defendant and its agents had always put this construction upon the rule.

The judge ruled that the construction put upon it by the defendant and its agents was of no force to bind the plaintiff. This was plainly right. The question for the court was, what was the true meaning of the rule. Not only had the plaintiff done nothing in his dealings with the defendant that would affect him by the defendant's construction of the rule, but he did not even know of the existence of the rule.

The judge found as a fact that the rule did not have the meaning for which the defendant contended. Inspection of the tariff book showed that this was a rule of the receiving department, and that this and other rules under the same and similar headings in the tariff book were intended for the use and guidance of the company's agents, and not for the public.

The language of the rule shows that the judge was right in his construction of it. While it requires that messages shall be written upon the form provided for the purpose, it does not forbid the writing of any other unobjectionable matter upon the same paper, in such a way as not to mislead the agents or cause them inconvenience in the performance of their duties. It was put upon the paper by the plaintiff in the form of a sticker or a notice which it was proper for him to give to the company, orally or in writing, in any reasonable way. The judge found that its presence on the blank had no tendency to confuse the defendant's operator, or to increase the probability of error or delay in transmitting the message, and that it did not obscure the printed heading above the message. The judge was right in holding that this rule was not a justification for the defendant's absolute refusal to transmit the message.

The only other question is whether the statute under which the plaintiff was permitted to recover is unconstitutional as a regulation of interstate commerce. Seemingly this question was not brought to the attention of the judge or the plaintiff's attorney at the trial, and perhaps it was not thought of then by anybody. But, against the plaintiff's contention, we treat it as

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open under the defendant's exception to the refusal of its fifth request for a ruling, namely, that "the defendant cannot be held liable under R. L. c. 122, § 9, for refusal to receive and transmit the message in question under the circumstances under which it was presented."

It is settled that telegraph lines extending through different States, to be used in an ordinary way, are instruments of commerce, and that messages passing over them from one State to another in the transaction of business are a part of interstate commerce that is entitled to the protection of the Constitution of the United States. *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.* 96 U. S. 1. *Telegraph Co.* v. *Texas*, 105 U. S. 460. *Western Union Telegraph Co.* v. *Pendleton*, 122 U. S. 347. It is also as well settled by the highest authority that such a statute as that in question, so long as Congress passes no law upon the same subject, is not a regulation of interstate commerce, within the meaning of the constitutional provision, but is a proper police regulation for the enforcement of the rules and policy of the common law, which affects interstate commerce only incidentally. *Western Union Telegraph Co.* v. *James*, 162 U. S. 650. *Missouri, Kansas & Texas Railway* v. *Haber*, 169 U. S. 613, 634. *Missouri Pacific Railway* v. *Larabee Flour Mills*, 211 U. S. 612, 622. *Western Union Telegraph Co.* v. *Wilson*, 213 U. S. 52, 55. *Western Union Telegraph Co.* v. *Commercial Milling Co.* 218 U. S. 406. The defendant's counsel has given us no reason and has referred us to no decision that should call for a different conclusion. There is no constitutional objection to the plaintiff's recovery under the findings of the judge.

Exceptions overruled.

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ADA M. CUSHMAN *vs.* BOSTON STORAGE WAREHOUSE COMPANY.

Suffolk. November 17, 1910. — January 5, 1911.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Replevin. Trustee Process. Attachment. Warehouseman. Practice, Civil, Exceptions.

Under R. L. c. 190, § 8, replevin will not lie to recover goods exceeding $20 in value, which were under attachment on trustee process in the hands of the defendant in replevin as trustee when they were taken from him on the replevin writ, although the property thus taken on the replevin writ consisted of necessary household goods less than $300 in value, which are exempt from attachment under R. L. c. 177, § 34, cl. 2, the remedy of the plaintiff, if any, being in tort against the officer who served the trustee process and the attaching creditor.

Although it here was said, that the provision of St. 1907, c. 582, § 19, excusing a warehouseman from liability for refusing to deliver goods deposited with him, adversely claimed, until he has had a reasonable time to ascertain the validity of the adverse claim, has no application to the refusal of a warehouseman to deliver goods attached in his hands by trustee process as the property of the depositor, the refusal of the trial judge in the present case to give an instruction to this effect was held not to be a sufficient ground for sustaining an exception, because the refusal of the defendant to deliver the goods to the plaintiff was justified on other grounds independent of the statute referred to, so that the error of the judge in refusing to give the instruction did not and could not have operated prejudicially to the plaintiff.

MORTON, J. The property which is the subject of this action consists of household goods deposited with the defendant in the name of the plaintiff. On the day on which they were deposited the defendant was summoned as trustee in an action brought against the plaintiff and her husband and returnable to the Municipal Court of the City of Boston. Before the return day of the writ the plaintiff made a demand on the defendant for the goods which the defendant refused because of the pendency of the trustee writ. Thereupon two or three days after the demand and refusal the plaintiff brought this action of replevin and the goods were taken out of the defendant's possession.

The trustee writ was duly entered in the municipal court and the defendant appeared and answered that it had in its possession at the date of the service of the writ certain household goods stored in the name of the plaintiff, whose value was un-

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known to it. Subsequently the trustee was charged upon its answer and the plaintiff, who had been admitted as claimant, appealed. In the Superior Court the claimant's claim was allowed and the trustee was discharged without costs. No appeal from or exceptions to this finding appear to have been taken. The case now before us was tried before a judge of the Superior Court* without a jury and the judge found in favor of the defendant. It is here on exceptions by the plaintiff to the finding so made and to the refusal of the judge to make certain rulings requested by her. The judge ruled and found as requested by the plaintiff that the goods were necessary household goods within $300 in value and were exempt from attachment,† but refused to rule, and we think rightly, as requested by the plaintiff that the plaintiff's right to possession of the goods was not affected by the pendency of the proceedings in the trustee suit. The effect of the trustee process was to attach the goods in the hands of the defendant as the plaintiff's goods, and until it was discharged as trustee the defendant was bound to hold them subject to any judgment which might be obtained and any execution which might be issued against the principal defendants. The trustee was not bound to decide at its peril whether they were or were not exempt from attachment. Although not in the hands of an officer the goods were in effect in the custody of the law, and the plaintiff, under our statute in regard to replevin, could not replevy them. R. L. c. 190, § 8. *Ilsley* v. *Stubbs*, 5 Mass. 280. *Baker* v. *Fales*, 16 Mass. 147, 150. *Allen* v. *Staples*, 6 Gray, 491, 493. The remedy of the plaintiff, if any, was in tort against the officer and the attaching creditor. *Bean* v. *Hubbard*, 4 Cush. 85. *Davlin* v. *Stone*, 4 Cush. 359. The peculiar language of our statute in regard to replevin which provides that if goods exceeding $20 in value "which have been attached on mesne process or taken on execution, are claimed by a person other than the defendant in the action in which they have been so attached or taken, the owner . . . may cause them to be replevied," renders the cases cited by the plaintiff from other States inapplicable.

The trial judge was asked to rule and should have ruled that

* *Hardy, J.*

† R. L. c. 177, § 34, cl. 2.

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St. 1907, c. 582, § 19,* relating to warehouse receipts, did not apply to this case and constituted no justification for the defendant's refusal to deliver the goods to the plaintiff. But in view of the other findings and rulings the error did not and could not have operated prejudicially to the plaintiff.

Exceptions overruled.

F. S. Hesseltine, for the plaintiff.

A. E. Burr, for the defendant, submitted a brief.

MARY L. DOWNS *vs.* EMILY A. PERKIN.

Middlesex. November 17, 1910. — January 5, 1911.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Frauds, Statute of, Promise to pay debt of another. *New York.*

In an action by one woman against another on an account annexed for board and lodging furnished by the plaintiff to a brother of the defendant upon an alleged promise of the defendant to pay for it, the defense relied upon was that the promise of the defendant was a promise to pay the debt of another under the statute of frauds of the State of New York, where the contract was made. It appeared that the statute of frauds of that State included "a special promise to answer for the debt, default or miscarriage of another person" and that this had been construed by the courts of New York to apply, like the similar provision in R. L. c. 74, § 1, to collateral and not to original promises and undertakings. The plaintiff testified that, before the board and lodging or any part of it was furnished, the defendant said to her "If you will take care of William [the defendant's brother], I will pay you when I can." This was denied by the defendant but was corroborated by other evidence of the plaintiff. The defendant introduced evidence which tended to show that her undertaking was collateral and not original in its nature. The presiding judge submitted the case to the jury, who returned a verdict for the plaintiff. *Held*, that on the conflicting evidence the case rightly was left to the jury.

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* The provision referred to is in Part II. of the statute, which is headed "Obligations and Rights of Warehousemen upon their Receipts," and is as follows: "If some one other than the depositor or person claiming under him has a claim to the title or possession of the goods, and the warehouseman has information of such claim, the warehouseman shall be excused from liability for refusing to deliver the goods, either to the depositor or person claiming under him or to the adverse claimant, until the warehouseman has had a reasonable time to ascertain the validity of the adverse claim, or to bring legal proceedings to compel all claimants to interplead."

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MORTON, J. This is an action of contract to recover for board and lodging furnished by the plaintiff to one William H. Mellins, the brother of the defendant, upon an alleged original undertaking by the defendant to pay for the same. The declaration was in two counts, the first being upon an account annexed, and the second for the sum found due upon an alleged accounting together. The presiding judge* ruled that the evidence did not support the second count and the case was submitted to the jury on the first count alone.

At the time of the making of the alleged promise the parties were all residents of the State of New York and the plaintiff still resides there. The presiding judge ruled that the case was governed by the law of New York. The defense was that the promise was a promise to pay the debt of another and not in writing and void under the statute of frauds of New York. The defendant introduced in evidence so much of the statute of frauds of New York as was applicable, and the following decisions by the courts of that State. *Larson* v. *Wyman*, 14 Wend. 246. *Payne* v. *Baldwin*, 14 Barb. 570. *Halsted* v. *Pelletreau*, 91 N. Y. Supp. 927. *Dixon* v. *Frazee*, 1 E. D. Smith, 32. At the close of the evidence the defendant asked the judge to rule and instruct the jury that the plaintiff was not entitled to recover on the first count, that the charges on the plaintiff's books, and the accepting by her of payments from the brother were conclusive against her right to recovery, and that by the law of New York the plaintiff was not entitled to recover. The presiding judge refused to rule as thus requested and submitted the case to the jury under instructions not otherwise objected to. The jury returned a verdict for the plaintiff, and the case is here on exceptions by the defendant to the refusal of the presiding judge to give the rulings and instructions requested. It was admitted that the defendant was able to pay.

We think that the rulings requested were rightly refused. The statute of frauds of New York so far as introduced in evidence is as follows, namely: "Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in

* The case was tried before *Bishop*, J. After his death the exceptions alleged by the defendant were allowed by *Harris*, J.

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writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking; . . . 2. Is a special promise to answer for the debt, default or miscarriage of another person."

This is substantially the same as similar provisions in our own statute, (R. L. c. 74, § 1,) and it has been construed by the courts of New York, as the cases introduced in evidence by the defendant show, as applying like our own statute to collateral and not to original promises and undertakings. The question then is whether according to the law of New York the defendant's alleged promise or undertaking should be regarded as an original or as a collateral promise or undertaking. And that, so far as the plaintiff's right to recover is concerned, depends, according to our understanding of the New York cases, on whether, taking the testimony as a whole, there is or is not any evidence which would warrant a finding that the undertaking was an original undertaking. We think it plain that there was such evidence.

The plaintiff testified, amongst other things, that in the course of a conversation about her brother the defendant said to her, "If you will take care of William [the defendant's brother], I will pay you when I can." This was said, according to the plaintiff's testimony, before the board and lodging or any part of it was furnished. It was denied by the defendant, but it could have been found that the circumstances under which it was testified to have been said and the situation of the brother corroborated the plaintiff. The plaintiff also testified to subsequent conversations with the defendant of a confirmatory nature. On the other hand there was evidence tending to show that the account which the plaintiff kept was charged to the brother and that it was entirely separate from an account which was charged to the defendant for board and lodging furnished to her during the first part of the time covered by the account against the brother. There was also other evidence, such as payments on account by the brother and a conversation which he had with the plaintiff's husband, who was her agent, and a conversation between the plaintiff's bookkeeper and the defendant, which the defendant contended showed that her undertaking was collateral and not original in its nature.

The case was not one where there was practically no dispute

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as to the material facts and the question became therefore one of law, but the facts were themselves in dispute and the case was therefore rightly left to the jury. No exceptions were taken to the instructions except so far as they were inconsistent with the rulings requested, and the instructions must therefore be deemed to have been correct and such as the case called for.

Exceptions overruled.

G. M. Poland, for the defendant.

P. B. Kiernan, for the plaintiff.

MOSES WILLIAMS, JR., & another *vs.* INHABITANTS OF DEDHAM.

Suffolk. November 18, 1910. — January 5, 1911.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Municipal Corporations, Liability to purchaser of defective tax title. *Tax. Covenant.*

A purchaser at a tax sale made by the collector of taxes of a town cannot recover from the town the amount paid by him for his tax deed containing the warranty required by R. L. c. 13, § 43, upon showing that the title was defective by reason of an insufficient notice of the sale by the collector, unless such purchaser within two years after the date of the deed complied with the requirement of R. L. c. 13, § 44, by offering by a writing given to the collector to surrender and discharge his deed or to assign and transfer to the town all his right, title and interest in the premises.

Whether the liability to the purchaser at a tax sale, which is imposed on a town or city by R. L. c. 13, § 44, in case it appears that, by reason of an error, omission or informality in the assessment or the sale, the purchaser has no claim upon the property sold, properly may be considered a liability upon the warranty of the collector of taxes that the sale has in all particulars been conducted according to law, which is required by R. L. c. 13, § 43, to be inserted in all tax deeds, here was not passed upon, because, although the action was brought against a town on the warranty, no recovery was permitted on account of the plaintiff's failure to make the offer required by R. L. c. 13, § 44.

CONTRACT against the town of Dedham upon a covenant of warranty contained in a deed of the collector of taxes of that town dated January 21, 1903, under the requirement of R. L. c. 13, § 43. Writ dated May 21, 1908.

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In the Superior Court the case was submitted to *King*, J., upon an agreed statement of facts, as follows:

On January 17, 1903, the tax collector of the town of Dedham sold the parcel of land described in the plaintiffs' declaration to the plaintiffs at a tax sale, and in pursuance of such tax sale executed and delivered the deed, of which a copy was annexed to the plaintiffs' declaration.

The consideration paid by the plaintiffs was as stated in the deed, $54.60, which was the amount of the tax properly assessed upon the property, plus interest and the costs of collection.

There was an alienation of the land in question on January 24, 1905.

The land was described in the notice of sale which the tax collector published preceding the sale, as set forth in the copy of the notice annexed to the plaintiffs' declaration.

The plaintiffs on August 11, 1905, brought proceedings to enforce their title to the land, and in those proceedings it was decided by the Supreme Judicial Court for the Commonwealth that the description in the notice of sale did not comply with the law and that the plaintiffs acquired no title to the land by the deed. See *Williams* v. *Bowers*, 197 Mass. 565.

The plaintiffs did not within two years after the date of the deed offer by writing given to the collector to surrender and discharge their deed or to assign and transfer to the town all their right, title and interest in the premises, nor did the collector within two years after the date of the deed give notice to the plaintiffs to release any interest which they might have in the land under said deed and to receive from the town the amount paid therefor with interest at ten per cent or to file with the collector a statement that they refused to release such interest.

The deed of the collector contained the covenant required by R. L. c. 13, § 43, that the sale had in all particulars been conducted according to law, and the action was brought upon that covenant.

The court was authorized to draw such inferences of fact as properly might be drawn from the foregoing agreed statement of facts.

The plaintiffs asked the judge to make the following rulings:

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"1. In order to sue on the covenant of warranty it was not necessary for the plaintiffs within two years after the date of their deed to offer by writing given to the collector to surrender and discharge their deed or to assign and transfer to the town all their right, title and interest in the premises.

"2. The town is liable on the covenant.

"3. On the facts stated in the agreed facts judgment should be for the plaintiffs for $54.60 and interest from January 17, 1903."

The judge ruled that there was a breach of the covenant, but refused to make any of the above rulings requested by the plaintiffs, and ruled, as requested by the defendant, that on all the agreed facts the plaintiffs could not recover, and that the plaintiffs, having failed to offer by a writing given to the collector to surrender and discharge their deed or to assign and transfer to the defendant all their right, title and interest in the premises within two years from the date of their deed, could not recover. He found as matter of law for the defendant on the agreed facts, drawing no inferences of fact therefrom.

The plaintiffs alleged exceptions.

The judge ordered judgment for the defendant. It did not appear that judgment was entered in accordance with this order, but it was stated in the record that the plaintiffs appealed.

R. D. Swaim, for the plaintiffs.

J. H. Soliday, for the defendant.

KNOWLTON, C. J. This is an action to recover from the defendant the amount paid by the plaintiffs for a tax deed of property described in the declaration, given by the collector of taxes of Dedham, it having been discovered that the title conveyed by the deed was defective by reason of an insufficient notice of the sale by the collector. The plaintiffs did not, within two years after the date of the deed, offer by writing given to the collector, to surrender and discharge their deed, or to assign and transfer to the town all their right, title and interest in the premises, as they might have done under the R. L. c. 13, § 44. The question is whether they can recover without having made such an offer.

It was held in *Lynde* v. *Melrose*, 10 Allen, 49, that, in the absence of a statute, a purchaser at a sale of real estate for taxes cannot recover from a city or town the amount paid, if

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the title proves to be invalid by reason of defects or informalities in the proceedings. The court said: "He buys a title without warranty, except such covenants as he takes from the collector; and he must rely only upon them." These, in the form prescribed for a collector's deed, are the personal covenants of the collector, and not covenants of the town. The town is not liable by reason of them, except in the manner and to the extent declared by the statute.

The first act on this subject was St. 1862, c. 183, § 6, which required a collector to insert a covenant that the sale had "in all particulars been conducted according to the provisions of law." It is then provided that, if it should appear that by reason of any error, omission or informality in any of the proceedings of assessment or sale, the purchaser had no claim upon the property sold, he might surrender and discharge his deed, and receive back from the city or town the amount paid by him. This was similar to the present statute, except that no limit of time was stated for the surrender and discharge of the deed. By the St. of 1878, c. 266, § 1, this section was amended by adding a proviso that the purchaser should, within two years from the date of the deed, offer in writing to surrender and discharge the deed, or to assign and transfer to the town or city all his right, title and interest therein, as the collector should elect. This provision has been retained in all subsequent re-enactments. Pub. Sts. c. 12, § 39. St. 1888, c. 390, §§ 43, 44. R. L. c. 13, § 44. St. 1909, c. 490, Part II. § 45.

These provisions of the statute create the only liability of a city or town for any defect in the title conveyed by the deed of a collector of taxes. The last sentence of the section is as follows: "No city or town and no treasurer or collector thereof shall pay or be liable for any amount due under the provisions of this section unless such statement is filed." R. L. c. 13, § 44. It is also said that the payment "shall be in full for all damages for any defects in the proceedings or under the warranty in such deed." Upon payment the collector is relieved from liability on his warranty, and the city or town is also relieved in like manner, so far as the liability of the municipality under these sections, or by implication under the R. L. c. 13, § 70, may be considered a liability upon the warranty.

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In *Spring* v. *Cambridge*, 199 Mass. 1, is this language: "By the terms of the statute it is only 'upon such surrender (of the deed) and discharge or assignment and transfer' that such a city or town is required to pay."

We are of opinion that the failure of the plaintiffs to avail themselves of their rights under this statute leaves them without a remedy against the town.

Exceptions overruled; judgment affirmed.

MARY MILTON *vs.* LUTHER W. PUFFER & others, administrators.

Suffolk. November 18, 1910. — January 5, 1911.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Nuisance. Trespass, Continuing. *Evidence*, Presumptions and burden of proof.

In an action of tort for damages alleged to have been caused by the maintenance of a nuisance which the defendant refused to discontinue when notified by the plaintiff to do so, it appeared that the plaintiff and the defendant were the owners of adjoining lots of land upon a city street, that when the plaintiff bought his land there stood upon the land of the defendant a brick building, erected nine years earlier, of which the wall above ground on the side toward the plaintiff's land extended to the boundary line, that the plaintiff in excavating for the foundations of a brick building to be built upon his own land discovered that all along the dividing line the foundation stones of the defendant's building projected irregularly into the plaintiff's land from ten to twelve inches and interfered materially with the construction of the plaintiff's building, that the defendant on notice from the plaintiff, after a delay which was alleged to have caused loss to the plaintiff, caused the stones to be cut off up to the dividing line, except for a distance of twelve or fourteen feet near the front of the properties, where the building inspector of the city refused to allow this to be done on the ground that it would weaken the wall of the defendant's building, and that the projections thus remaining caused the plaintiff additional expense in the erection of his building. *Held*, that, although the plaintiff could not sue for the original trespass, because he was not the owner of the land encroached upon at the time the trespass was committed more than six years before the date of the writ, the maintenance of the projecting stones by the defendant constituted successive or continuing trespasses or nuisances for which the plaintiff could maintain an action to recover any damages caused to him thereby.

In an action by the owner of a lot of land on a city street against the owner of the adjoining lot for a nuisance maintained by the defendant or continuing trespasses committed by him in maintaining foundation stones projecting into the plaintiff's

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land, if the defendant relies in defense upon an alleged right or license obtained from the former owner of the plaintiff's land, the burden is on the defendant to show that he had such a right or license.

MORTON, J. The plaintiff and the defendants' intestate, whom we shall speak of as the defendant, owned adjoining estates on Irving Street in Boston. On the premises of the defendant was a brick building which he had erected after he acquired title in 1896, the face of the southerly wall of which coincided with the dividing line between the two estates. The plaintiff acquired title in 1905 and immediately began the erection of a brick building according to plans which contemplated that the northerly foundation and wall should be up to and flush with the northerly line of her land and the dividing line between the two estates. In excavating for the foundations the plaintiff found that all along the dividing line the foundation stones of the defendant's building projected irregularly into her land from ten to twelve inches and interfered materially with the construction of her building. Thereupon she complained to the defendant, and after a delay which inflicted upon her, as the plaintiff contended, a substantial loss, the defendant caused the stones to be cut off up to the dividing line except for a distance of twelve or fourteen feet near the front of the two estates where the building inspector of the city of Boston refused to allow it to be done on the ground that owing to the peculiar nature of the foundation of the defendant's building at that point it would tend, if done, to weaken the wall of the defendant's building. In consequence thereof the plaintiff was subjected, as she alleges, to additional expense in the erection of her building which she seeks to recover in this action * with other

* The declaration alleged that on November 7, 1905, the plaintiff was the owner of the premises, describing them, "that on said date she mortgaged said estate to David Stern for $12,000 as security to said David Stern for the payment of said amount in four months from said date with interest thereon at the rate of ten per cent per annum, said amount having been borrowed of said Stern to enable the plaintiff to erect a four family brick dwelling house on said land; and that for the purpose of erecting said dwelling house she thereupon immediately removed from said land certain buildings then standing thereon, and that in the course of so clearing said land she discovered that there were throughout the entire northerly boundary thereof foundation stones and piles forming part of and sustaining the struc-

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expenses and damages alleged to have been caused by the projection of the stones into her land and the maintenance of them there. At the conclusion of the plaintiff's evidence the presiding judge * ruled that the plaintiff was not entitled to recover, and directed the jury to return a verdict for the defendant. The case is here upon exceptions by the plaintiff to this ruling and direction. We think that the ruling and direction were wrong.

Projecting the stones into the adjoining land without a right or license from the owner to do so was a wrongful act on the part of the defendant, and the maintenance of them in the position in which they were so placed constituted a continuing trespass or nuisance. *Smith* v. *Smith*, 110 Mass. 302, 304.

The plaintiff cannot maintain an action against the defendant for the original trespass since she was not in possession at the time that it was committed. The plaintiff, however, does not seek to recover for that. But the maintenance of the stones in the places where they were originally put constituted successive or continuing trespasses or nuisances and any one injured thereby could maintain an action therefor. *Prentiss* v. *Wood*, 132 Mass. 486, 488. *Curtis Manuf. Co.* v. *Spencer Wire Co.* 203 Mass. 448. 452. That is the cause of action set out in the declaration.

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tures then standing upon the parcel of real estate adjoining her said estate on the northerly side thereof projecting into and resting upon said estate of the plaintiff, that said stones and piles were so placed there and then and there so maintained by the defendant without right or license therefor and the same then and there were a nuisance on the plaintiff's said estate, and the defendant was then and there duly notified and informed by the plaintiff of all the facts hereinbefore alleged and that said projections must be forthwith removed and that they were then and there delaying the plaintiff in her said building operations at great expense to the plaintiff on account of said construction loan mortgage and loss of the use of her said estate; but the plaintiff alleges the defendant refused to remove said projections, and did not remove the same, and caused the plaintiff to go to the expense of having her said estate surveyed, all to the great expense and loss of time and money to the plaintiff, and the completion of the plaintiff's said building was delayed thereby, and the plaintiff has been thereby prevented from receiving rents and profits from the use of her said estate and has been compelled to pay ten per cent interest on said mortgage for a great length of time solely on account of said projections all to the great loss and damage of the plaintiff."

* *Fox*, J.

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If the defendant relied on a right or license obtained from the former owner of the premises belonging to the plaintiff, the burden was on him to show that he had such right or license. *McLeod* v. *Jones*, 105 Mass. 403, 407. *Collier* v. *Jenks*, 19 R. I. 493.

Exceptions sustained.

C. F. Smith, for the plaintiff.

I. R. Clark & G. F. Ordway, for the defendants, submitted a brief.

EDWARD H. MASON *vs.* MASSACHUSETTS GENERAL HOSPITAL & others.

Middlesex. November 28, 1910. — January 5, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Devise and Legacy, Designation of beneficiary. *Trust. Words*, "Massachusetts Hospital."

One, who in 1863 was a hair dresser doing business on Spring Lane in Boston and was sixty-three years of age and a man of intelligence, having "the knowledge of men of that age moving about the city ordinarily," made a will which left the residue of his estate after the death of his wife to a trustee for certain purposes until the survivor of the testator's children should die either under twenty-one years of age or without issue, on the happening of which contingency, after making certain payments, the trustee was given the following direction: "All the residue and remainder of my property shall be given to the Massachusetts Hospital for diseased and wounded soldiers." The testator died in 1867, and the survivor of his children died without issue in 1908. A fund of $10,000 then was in the hands of the trustee to be disposed of. An association known as the Discharged Soldiers' Home had been established a few years before the will was made for the purpose of providing a home for sick and wounded soldiers who had been honorably discharged from the army of the United States, and the Legislature for several years had made appropriations to assist in its maintenance. A governor of the Commonwealth and his wife were intimate neighbors of the testator and the Governor's wife for three years immediately following the testator's death was an officer and one of the managers of the Home. That association was not in existence in 1908. The Massachusetts General Hospital was incorporated in 1810 and at the time the will was made was maintaining a hospital where diseased and wounded soldiers were treated as well as other patients, which fact was generally known. It had for some years been known and called by the name "Massachusetts Hospital," as well as by its corporate name. A single justice, who heard a bill in equity by the trustee for instructions, found among other facts that there was nothing in the case to show that the testator had had his attention called either to the Discharged Soldiers' Home

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or to the Massachusetts General Hospital; or that he knew anything about them, except what may be presumed to have been known by a man who lived and worked in Boston as he did. *Held*, that the words "for diseased and wounded soldiers" in the clause in question were not descriptive of the institution which was to take, but of the purpose to which the gift was to be devoted, and that the testator intended that the residue should be given to the Massachusetts General Hospital, to be held and administered by it for diseased and wounded soldiers.

BILL IN EQUITY, filed in the Probate Court on February 28, 1910, seeking instructions as to the residuary clause, quoted in the opinion, of the will of John Ashton, late of Newton.

The proceedings in the Probate Court are described in the opinion.

On appeal to this court, the case was heard by *Hammond*, J. Besides the facts stated in the opinion, the single justice found that the testator made his will on December 17, 1863, and that he died on May 14, 1867. The will contained many bequests and then left the residue of the estate, after the death of the testator's wife, to trustees with directions as to the disposition of the income. After the death of the survivor of the testator's children under twenty-one years of age or without issue, the trustees were to make certain specific payments, and then to dispose of the residue according to the clause quoted in the opinion. The testator's last surviving child was Kate Ashton, who died on January 13, 1908, without issue.

The single justice also found that the testator and Governor Claflin and Mrs. Claflin were neighbors and intimate, and that in 1867, 1868 and 1869 Mrs. Claflin was one of the managers and officers of the Discharged Soldiers' Home. He also found that "at the time this will was made the Massachusetts General Hospital was, and for some years had been, known and called as well the Massachusetts Hospital as the Massachusetts General Hospital. I find that at the time this will was made, provision had been made there for the care of diseased and wounded soldiers, — not as a Home for Discharged Soldiers, but as a place where wounded and diseased soldiers should be treated, and that that was generally known, — that a wounded soldier could go there as any other patient could. But I do not find that this institution made any provision for the care of discharged soldiers as such or that it was intended as a Home for Soldiers."

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The single justice reserved the case upon certain facts found by him for determination by the full court.

A. Hemenway, (*J. Abbott* with him,) for the Massachusetts General Hospital.

B. B. Jones, (*N. N. Jones* with him,) for the Trustees of the Soldiers' Home in Massachusetts.

MORTON, J. This is a bill in equity by the surviving trustee under the will of one John Ashton for instructions as to the construction of the following residuary clause in said will: "7th. All the residue and remainder of my property shall be given to the Massachusetts Hospital for diseased and wounded soldiers." The plaintiff has upwards of $20,000 in his hands to be disposed of under the clause in question. Various parties were made defendants. The Massachusetts General Hospital, the Massachusetts Homœopathic Hospital, the Trustees of the Soldiers' Home in Massachusetts, Mary G. Rustemeyer and the Attorney-General appeared in the Probate Court. The others were all defaulted. The Probate Court * ordered and decreed that the plaintiff "pay over said residue and remainder . . . to the Trustees of the Soldiers' Home in Massachusetts aforesaid, to receive and expend for the benefit of diseased and wounded soldiers in Massachusetts." The Massachusetts General Hospital appealed. The single justice was of opinion upon the facts found by him that the Massachusetts General Hospital was the legatee intended by the testator, but at the request of the parties reserved the case upon the facts found by him for the full court. The heir at law did not appear at the hearing in this court, and it is not contended by her, or any one else, that the contingency upon which the residuary clause was to become operative has not occurred.

The single justice found that the Trustees of the Soldiers' Home in Massachusetts was not in existence when the will was made, and that the Massachusetts Homœopathic Hospital was incorporated in 1851, and its first hospital was not established until 1871; and he found that neither of these institutions was intended by the testator. Counsel for the Trustees of the Soldiers' Home do not contend that it was the institution intended by the testator. Their contention is that the institution intended by

* *McIntire*, J.

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the testator was an Association on Springfield Street in the city of Boston, known as the Discharged Soldiers' Home, which had been established a short time before the will was made, for the purpose of providing a home for sick and wounded soldiers who had been honorably discharged from the army of the United States. That association or institution has admittedly ceased to exist; but it is contended by the Trustees of the Soldiers' Home in Massachusetts that the gift constitutes a charitable trust, that the case is one for the application of the *cy pres* doctrine, and that the fund should be handed over to them to administer.

We interpret the words "for diseased and wounded soldiers" in the clause in question, not as descriptive of the institution which is to take, but of the purpose to which the gift is to be devoted. That, it seems to us, is the natural construction of the language used. The question then is, What institution or corporation did the testator mean by the words "Massachusetts Hospital"?

In the effort to ascertain whom the testator meant it is proper to consider the circumstances existing at the time when the will was made. And if in the light of those it is plain what corporation or institution was intended, then such corporation or institution is to take regardless of the fact that there may be another institution or corporation which would better carry out the testator's purpose. See *Tucker* v. *Seaman's Aid Society*, 7 Met. 188.

The single justice found that the Massachusetts General Hospital was incorporated in 1810, and that "at the time this will was made . . . [it] was, and for some years had been, known and called as well the Massachusetts Hospital as the Massachusetts General Hospital." He further found that at the time the will was made "provision had been made there for the care of diseased and wounded soldiers — not as a Home for Discharged Soldiers, but as a place where wounded and diseased soldiers should be treated, and that that was generally known." He found that the testator was a hair dresser doing business on Spring Lane in Boston; that he was sixty-three years of age when the will was made; that he was a man of intelligence and "had the knowledge of men of that age moving about the city ordinarily." But there was nothing in the case, he says, upon which he could

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find that the testator had had his attention called one way or another to either the Massachusetts General Hospital or the Discharged Soldiers' Home on Springfield Street, "or that he knew anything about them, except what may be presumed to be known by a man who lived and worked here as he did."

It is apparent from the findings of the single justice that the principal if not the sole purpose of the institution on Springfield Street was to care for sick and wounded soldiers, differing in that respect from the Massachusetts General Hospital, and it may well have appealed for sympathy and support to the patriotic feelings which so profoundly stirred all classes in this and other communities at the North at the time when the will was made. The Legislature for several years made appropriations for its support and maintenance, at first with the condition that an equal amount should be raised by private subscription, and later without that condition. It is possible, of course, that the testator knew of the existence of that institution. But it is hardly conceivable that if he had intended to make that institution the object of his bounty he would not have described it by some fitting name. The only institution to which the name which he has chosen naturally applies is the Massachusetts General Hospital. It is expressly found that that corporation was as well known by the name of the Massachusetts Hospital as by its corporate name at the time when the will was made. It had existed for a long time, and it is not unreasonable to suppose that the testator knew of it. Indeed it would seem that he must have known or heard of it. The name which he has used to describe the legatee describes that institution and no other; and we think the conclusion to which the single justice came that the Massachusetts General Hospital was the legatee intended was correct, and that a decree should be entered ordering the fund to be paid to it, to be held and administered by it for the purposes named in the will.

So ordered.

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MARY J. HAWKES *vs.* WILLIAM A. LACKEY & another.
SAME *vs.* SAME.

Suffolk. December 2, 1910. — January 5, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Equity Jurisdiction, Laches, For an accounting, To relieve from results of breach of confidence by fiduciary, To re-form promissory note. *Bills and Notes. Evidence*, Admissions by conduct. *Equity Pleading and Practice*, Interest. *Interest.*

There was no laches in the bringing in January and July of 1909 of two suits in equity seeking an accounting as to thirteen transactions occurring during a period from October, 1903, to July, 1907, as to investments and reinvestments of sums of money and securities given by three elderly women of practically no business experience to the defendant, a distant relation about thirty years of age, educated as a lawyer, with whom they had dealt from a feeling of blind and unquestioning trust and who knew and intended that they should so act.

Two elderly women of intelligence and education, who knew the character and meaning of interest on money and of the time at which a note is payable but had had scarcely any business experience and were almost like children in business matters, trusted implicitly in certain business transactions a man about thirty years of age, who was a relation of theirs and for a long time had been intimate with an aunt, with whom they had lived up to the time of her death, and likewise had been trusted by her, and who had had a college and law school education and knew of the extent of their business experience and capacity. The aunt died leaving her property to her two nieces. The man at that time owed the aunt's estate $2,050. Knowing that the nieces would act upon his suggestion with a feeling of blind and unquestioning trust in him and would desire to accommodate him, the man, without making any false or fraudulent representation of fact in the matter, and without any coercion or inducement on his part, and also without any warning or discussion or suggestion that they should consult an attorney who he knew was acting for the aunt's estate, for his own advantage and not in the interest of the aunt's estate asked each of them to accept for her share of the debt due to the aunt's estate a ten year note for $1,025 bearing interest at four per cent, and, without considering or appreciating the possible effect of their accepting the notes, they complied with the request because of their unquestioning trust in him and of a desire to accommodate him and partly from a desire to help certain speculations which they knew the man was making and possibly to participate therein. Thereafter the women received various semiannual payments of interest at four per cent. Three years after the giving of the note a suit was brought by one of the sisters on her own behalf and as assignee of the claims belonging to the other sister and to the estate of the aunt for an accounting and for a cancellation of the notes, and the judge who heard the case found that the women were induced to receive the payments of interest by undue influence of the defendant, and that the notes should be re-formed into demand notes carrying interest at four per cent until the filing of the bill in equity and thereafter at six per cent. *Held*,

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that the bill was not barred by laches and that the finding and decree of the judge were warranted.

Wherever two persons stand in such a relation that, while the relation continues, confidence necessarily is reposed by one and the influence which naturally grows out of that confidence is possessed by the other, and the confidence is abused or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transactions could not have been impeached if no such confidential relations had existed.

The mere fact that, after an elderly and confiding woman received from a young man in place of a debt owed by him to an estate in which she was beneficially interested a ten year promissory note of which he was the maker and she was the payee, which was given under such circumstances as to constitute a breach of a fiduciary relation in which the maker stood toward the payee, the payee received certain payments of interest upon the note, is not conclusive evidence of an election on the part of the payee to confirm the taking of the note, but, at strongest, can amount only to an admission by her, and, like all bare admissions, is merely evidence to be considered on the question whether such election was made.

Neither the mere fact that an elderly woman, who was the payee of a check, passed the title to it to a man who stood in a relation of confidential business adviser to her by passing it through his father, nor the fact that an attempt was made first to indorse the check to the father and then to have it indorsed by the father to the confidential adviser, is conclusive evidence that the amount of the check was lent to the father by the payee; but at most it is evidence to be considered on that point.

A suit in equity was referred to a master, who in his report found a certain sum of money to be due to the plaintiff, which was made up of certain payments made to the defendant by the plaintiff and simple interest thereon. The report was confirmed and a final decree was made directing the defendant to pay to the plaintiff the aggregate amount found due by the master and interest thereon at six per cent from the date of the filing of the report. *Held*, that under R. L. c. 177, § 8, the plaintiff had a right to have interest so computed.

TWO BILLS IN EQUITY, the first filed in the Superior Court on January 28, 1909, and amended on November 19, 1909, against William A. Lackey (hereinafter called the defendant) and the trustee under the will of one Mary A. Alley, seeking an accounting by the defendant Lackey as to certain business transactions carried on by him with and for the plaintiff, a transfer of certain securities which were alleged to belong to the plaintiff and wrongfully to have been retained by the defendant, the establishment of a debt due to the plaintiff from the defendant, and also to reach and apply in satisfaction of debts so established an interest of the defendant in a trust under the will of Mary A. Alley. In the second bill, which was filed in the same court on July 7, 1909, like remedies were sought on like grounds by the same plaintiff as assignee of like claims of her sister, Sarah E.

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Hawkes, and of the executrix of the will of her aunt, Elizabeth S. Hawkes.

The suits were referred to Henry W. Putnam, Esquire, as master. In his report he made the following general findings of fact, others being stated in the opinion:

At the time of the transactions in question Elizabeth S. Hawkes resided in Marblehead and was over eighty years of age, but was well preserved in body and mind, and remained bright and active until within a few days of her death, which occurred in June, 1905.

Elizabeth S. Hawkes had for many years up to 1895 kept a millinery store in Marblehead, and partly from her savings in that business and partly from inheritance had accumulated a considerable property which was very conservatively invested in real estate, government and municipal bonds, bank stocks, deposits in savings banks, and the like, and which she wholly managed herself. Mary J. Hawkes and Sarah E. Hawkes were her nearest of kin, and were understood to be prospectively, — and became in fact, in the event, — her sole residuary legatees in equal portions. Both were over fifty years of age and had lived with her as the only members of her family and practically as her children, Mary from the age of five days and Sarah from the age of about six years. Both had helped her somewhat in the millinery store, without pay except in board, lodging, and motherly care, and had been wholly dependent on her for support. They had no property except certain savings bank deposits, which afterwards they entrusted to the defendant, and one other deposit, and had derived the money for those deposits wholly from gifts from their aunt.

The defendant was a relative, and was quite intimate with the three women, who had confidence in him. He was about thirty years old at the beginning of these transactions, had graduated from Harvard College in 1895 taking the classical course, and since then had taught arithmetic and grammar and later general commercial law in schools, private classes, commercial colleges and the Young Men's Christian Union and the Young Men's Christian Association, and had accumulated a deposit of a few hundred dollars in a savings bank in Webster. In September, 1905, he entered the Boston University Law School, completed

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the three years' course in two years and graduated and was admitted to the bar in 1907. Upon receiving from Elizabeth S. Hawkes on October 5, 1903, the first cash and securities entrusted to him by any of the three, he entered upon an active and extensive career of speculation in the stock market on his own account, almost wholly upon margins, with the money received from the Misses Hawkes and from other persons as well as with his own funds, and continued the same during the entire period covered by this report up to the filing of the bill in the first suit, receiving from the brokers from three to eight and one half per cent interest per annum on his deposits. He kept no books of account or bank deposits either of his own or of other persons' money, and mingled it all in one running account in his own name with the successive brokerage firms with which he carried on his stock speculations. He had no aids for his own memory or for the enlightenment of others in regard to his transactions except occasional and imperfect memoranda in diaries, checks, receipts, brokers' accounts, and the like, and his memory was very uncertain.

The master described in detail thirteen transactions of the kind above mentioned, occurring at dates between October 5, 1903, and July 27, 1907, nine of which were with Elizabeth S. Hawkes, two with Mary J. Hawkes and two with Sarah E. Hawkes.

As to the transaction regarding the check for $1,600, referred to in the opinion, the master found as follows:

"In the summer of 1904 the First National Bank of Lynn in which Elizabeth S. Hawkes was the owner of a number of shares, went into liquidation and was reorganized into the Essex Trust Company under a plan by which the Bank stockholders had the option either to take one share of the trust company in exchange for every two shares of the bank held by them or to be paid cash for the latter at a certain price per share. Miss Hawkes chose the latter alternative and on August 22, 1904, received the trust company's check to her order for $1,600, which she transferred to the defendant by indorsing it to the order of William H. Lackey, the defendant's father, who, as a part of her indorsement and before her signature, indorsed it to the defendant. The following is a copy of all the indorsements on

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said check in the order in which they stand, and I find as a fact that they were successively written in the same order.

'Pay to the order of Wm. H. Lackey'
[Written by Elizabeth S. Hawkes.]
'Pay to the order of William A. Lackey
William H. Lackey'
[Written and signed by William H. Lackey.]
'Pay to the order of Kidder Peabody & Co.
Wm. A. Lackey
William A. Lackey'
[Written and signed by William A. Lackey.]
'Elizabeth S. Hawkes.'

"I find on all the evidence that the defendant was accountable for the proceeds of said check to Miss Elizabeth S. Hawkes and that he is therefore now accountable for the same to her executrix with six per cent interest."

As to the two ten year notes aggregating $2,050, mentioned in the opinion, the master found substantially as follows:

During the lifetime of Elizabeth S. Hawkes, the plaintiff's aunt, the defendant gave to her a note, dated April, 1904, and reading, "For value received I promise to pay to Elizabeth S. Hawkes two thousand and fifty dollars," that being the amount of a debt then owed to her. "As this note was not negotiable it was, I assume, not *prima facie* payment of the pre-existing obligation or debt he owed her and I find, so far as it is a question of fact, that the latter was not paid or merged by said note, and remained unpaid till the death of Elizabeth S. Hawkes, except as to two partial payments of $41 each on November 1, 1904, and May 1, 1905, which were the exact equivalent of semi-annual instalments of interest at four per cent per annum, on said note; also that no agreement was made between the defendant and said Elizabeth S. Hawkes abrogating, or modifying in any particular, the character or terms of" the original obligation or debt of $2,050, "or waiving the same, unless her acceptance of said payments constituted as matter of law a waiver of six per cent interest and an election to treat the original obligation as a four per cent loan.

"On January 20, 1906, the defendant gave to Mary J. and

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Sarah E. Hawkes each a negotiable ten year four per cent note for $1,025 dating them back to May 1, 1904, which was approximately the date of the original $2,050 note, taking up and destroying the $2,050 note. This was intended by the parties as an informal partial distribution of Elizabeth S. Hawkes's estate between her two sole and equal residuary legatees, — no probate account having been made by the executrix.

"On November 1, 1905, defendant paid and the plaintiffs received $41, and on May 1, 1906, and on each succeeding May 1 and November 1 up to and including November 1, 1908, they received $20.50 each, being the amount of the semiannual interest at four per cent per annum. I find, so far as it is a question of fact, that no agreement was made between the defendant and the executrix of Elizabeth S. Hawkes's estate or between him and Mary J. or Sarah E. Hawkes, abrogating or modifying in any particular the character or terms of the original obligation and debt to Elizabeth S. Hawkes or waiving the same, unless the transaction of January 20, 1906, and the acceptance of said payments constituted as matter of law a waiver of six per cent interest or an election to treat the original obligation as a four per cent loan.

"I also find as a fact that these two $1,025 notes were not a gift by defendant of that sum to either the payees or the estate of Elizabeth S. Hawkes outside of, and over and above, any sum which he might owe them, nor anything but a memorandum of, and in recognition or acknowledgment of, the principal sum of said original obligation or debt of $2,050 to Elizabeth S. Hawkes, and that, upon plaintiff's obtaining a decree for the latter, the defendant is entitled to have said notes delivered up to him or filed with the papers in the case.

"As these two $1,025 notes do not run to the executrix, I assume the law to be that, although a negotiable promissory note is *prima facie* payment of a pre-existing debt for the same amount due from the maker to the payee, it is not so of a debt due from the maker to another person, — that in such a case there is no merger; and that therefore these notes did not constitute payment or merger of said original obligation or debt, — which I conclude on my findings of fact, to have been then still due to the estate of Elizabeth S. Hawkes, — even assuming in

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the defendant's favor that the executrix could legally give an eight year extension at four per cent of a six per cent debt already due her testator's estate. I accordingly conclude that said original obligation or debt is still due according to its original terms as above found by me, to the estate of Elizabeth S. Hawkes after crediting thereon certain partial payments."

Objections and exceptions to the report were filed by the defendant only. Such of them as are material to the decision are stated in substance in the opinion. The suits were heard upon the defendant's exceptions and the matter of final decrees by *Pierce*, J., who made final decrees, that in the first case establishing the debt of the defendant and costs at $6,376.96, and the debt in the second case at $14,460.79, and appointing a special master to sell the interest of the defendant in the trust under the will of Mary A. Alley, in case he refused to satisfy the decrees in full. The defendant Lackey appealed.

F. Paul, for the defendant Lackey.

B. B. Jones, (*G. Calkins* with him,) for the plaintiff.

SHELDON, J. The first contention made by the defendant Lackey, hereinafter called the defendant, is that these bills ought to be dismissed by reason of laches on the part of the plaintiff. That defense was not set up in the pleadings, and is not now open to the defendant as of right. *Stewart* v. *Joyce*, 201 Mass. 301. Nor, considering the character of the actions, and the facts found by the master, ought such a defense to be sustained. As to most of the transactions complained of, the delay in bringing suit has been largely due to the misplaced confidence reposed in the defendant by the plaintiff and her aunt and sister, in whose right the second suit is brought. The defendant has not changed his position or lost anything from the fact that the suits were not brought earlier. *Stewart* v. *Finkelstone*, 206 Mass. 28, 86. As to some of the complaints made against him, he rests his defense on the ground that the bills were prematurely brought.

The judge of the Superior Court sustained the defendant's exceptions numbered thirteen to twenty inclusive, so far as they related to the master's assumption of law that there was no merger of the defendant's obligation of $2,050 to Elizabeth S. Hawkes by the two ten year notes, each for half that sum which

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the defendant gave respectively to the plaintiff and her sister Sarah. The plaintiff did not appeal, and the correctness of this ruling is not before us. But the judge also found as a conclusion of fact and law from the whole of the master's report that the plaintiff and her sister were induced to receive the payments of interest upon these notes by undue influence of the defendant, and that the notes should be reformed into demand notes carrying interest at four per cent to the date of the filing of the bill and thereafter at six per cent. The right of the judge to make further or different findings by inferences drawn from the facts reported by the master is settled. *Rosenberg* v. *Schraer*, 200 Mass. 218. *American Circular Loom Co.* v. *Wilson*, 198 Mass. 182, 200, and cases cited. And see *Knowles* v. *Knowles*, 205 Mass. 290, 294. But the defendant contends that this finding, that the conduct of the plaintiff and her sister was induced by the undue influence of the defendant, was unsupported by the facts found and reported by the master and was unwarranted. This contention makes it necessary to examine the master's report.

He has found that at the time of the transactions in question the plaintiff and her sister were each more than fifty years of age, with no property except what had come to them from their aunt, Elizabeth S. Hawkes. They were intelligent and well educated and knew the character and meaning of interest on money and of the time at which a note was payable. But they had scarcely any business experience, and at the beginning of the time in question were almost like children in money matters; and these facts were known to the defendant. They trusted him implicitly, and apparently always did what he asked or advised, although the legal matters connected with their aunt's estate were, as the defendant knew, in the hands of an attorney, who had not been consulted about these notes and was not present when they were given. The defendant was a relative of these ladies, was intimate with them, and they had confidence in him. He was about thirty years of age and a college graduate. He had had little business experience except through his speculations in stocks, which seem to have been extensive and long continued, and apparently were finally disastrous. For about two years he had acted for these sisters, and for their

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aunt in her lifetime, making some investments for them with a part of the money which he procured from them. That fiduciary relation and their confidence in him continued until some months before the first of the suits was brought. He asked for the ten year extension of the notes for his own advantage and not in the interest of their aunt's estate, which had become practically theirs. He did not make any false or fraudulent representation of fact to them in connection with this matter. They acted, and it is a fair and really a necessary inference from the findings of the master that he knew that they acted and intended that they should act, from a feeling of blind and unquestioning trust in him, and also of accommodation towards him, apparently without considering or appreciating the possible effect of their accepting the notes; partly also from a desire, which began in them soon after their aunt's death, to help his speculations and themselves to participate in these, as they afterwards did in one of them. But they acted in taking these notes and in receiving payments of interest thereon without any coercion or inducement on his part, unless his letting them do so without any special warning or discussion or any suggestion that they should consult their attorney, and knowing their trust and confidence in him, constitute in law such inducement or coercion. In other words, owing to them the duties which grew out of the fiduciary relations that existed between them and him, he acted, and availed himself of their trust and confidence in him to lead them to act, for his own benefit and advantage and to their hazard and detriment with reference to the fiduciary obligations which he owed to them.

The law in relation to such transactions is well settled. It was succinctly stated by Lord Chelmsford in *Tate* v. *Williamson*, L. R. 2 Ch. 55, 61: "Wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed." The principle has been affirmed by this court

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in many cases where, under diverse circumstances and by reason of different relations, a special duty was owed by one party to another, either by reason of confidence having been reposed in the former or because of a duty having been created by law. It was applied to dealings between attorney and client in *Hill* v. *Hall*, 191 Mass. 253; to trustees in *Hayes* v. *Hall*, 188 Mass. 510; to executors in *Bowen* v. *Richardson*, 133 Mass. 393; to brokers, as to matters within the scope of their agency, in *Quinn* v. *Burton*, 195 Mass. 277, 279; to directors of a corporation in *Parker* v. *Nickerson*, 112 Mass. 195; to promoters in *Hayward* v. *Leeson*, 176 Mass. 310, and *Old Dominion Copper Mining & Smelting Co.* v. *Bigelow*, 188 Mass. 315, and 203 Mass. 159. Although the court were divided in opinion in the final decision of the case last cited, there was no disagreement as to the general principle stated. See further *Woodbury* v. *Woodbury*, 141 Mass. 329, *Lane* v. *Moore*, 151 Mass. 87, and *In re Garnett*, 31 Ch. D. 1. This is a question of the violation of the duties owed by one who stands in a relation of trust and confidence, not the exertion of undue influence by one who owed no special duty and who sought to gain his end either by actual deception or by means of a domination over the mind of the person practised upon, as in *Howe* v. *Howe*, 99 Mass. 88, and similar cases.

We are clearly of opinion that the conclusion of the judge as to this matter was well warranted by the master's report.

The fact that the plaintiff and her sister had received some payments of interest upon these notes was not under the circumstances conclusive evidence of an election on their part to confirm the taking of the notes. Pressed to its strongest, this could not amount to more than an admission by them. Like all bare admissions, it was merely evidence to be considered, as it has been considered, by the master.

The fact that Elizabeth S. Hawkes passed the title to the check for $1,600 to the defendant through his father, and that the attempt was made to indorse it first to the father, then to be indorsed by the father to the defendant, does not make it necessary to find that this was a loan by her to the father and not to the defendant. This too was a piece of evidence, upon which the master was to pass. He has done

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so, with other evidence which is not before us. We cannot revise his finding.

Upon examination of the master's report, the defendant's exceptions thereto, and the interlocutory and final decrees entered thereon, we find no error in the allowances of interest that finally were made, and only one matter that calls for any discussion. The master reported the sums found due from the defendant in each transaction, and reckoned interest thereon in various ways to meet the different rules of law that might be found to be applicable. The judge sustained the defendant's contention that he should be charged only with simple interest, and as to some matters with interest to be computed at the rate of only four per cent up to the dates of filing the respective bills. But the defendant contends that in the final decrees interest was charged upon the aggregate sums found by the master from the date of the filing of the master's report, and that the result of this was to charge him with interest at least once compounded, because the amounts reported were made up in part of interest reckoned up to the date of the report. It might be doubted whether upon this record such a position is open to the defendant. *Young* v. *Winkley*, 191 Mass. 570. We assume however that he may contend that the final decree was erroneous in any particular disclosed by the record. *Nelson* v. *Winchell & Co.* 203 Mass. 75, 93.

It was early decided that where the plaintiff in an action upon a contract was delayed in obtaining judgment by an unsuccessful effort of the defendant to obtain a new trial, his judgment should include interest upon the amount of the verdict from the time that it was rendered. *Vail* v. *Nickerson*, 6 Mass. 262. This rule has since been extended by statute and applied to all awards of county commissioners, committees or referees, and reports of auditors or masters in chancery, as well as to all verdicts of juries. R. L. c. 177, § 8. That is decisive of the present contentions. It was the plaintiff's right to have interest computed as the defendant contends was done. See *East Tennessee Land Co.* v. *Leeson*, 185 Mass. 4; *Jackson* v. *Brockton*, 182 Mass. 26.

All the points that were argued before us are covered by what has been said. In each case the decrees appealed from, unless

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the Superior Court should see fit to revise the computations of interest upon which the final decrees were based, must be modified by charging the defendant with additional interest for the time that has since passed and with the costs of this appeal; and so modified must be affirmed.

So ordered.

OTTO FLEISCHNER *vs.* CHARLES E. DURGIN.

Middlesex. December 5, 1910. — January 5, 1911.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Agency, Scope of employment.

If the owner of an automobile employs one, who is not in his general employ, to drive the automobile from a garage in Brookline to a shop less than a mile away in Brookline, and the driver without the knowledge or consent of the owner first takes the automobile to a square in Brookline, which is not on the way to the designated shop, has lunch, then with a friend drives the automobile to a shop in Boston six miles farther out of his way for the purpose of getting a chain for his own use, and then, just after he has turned back to go to the place to which he had been directed to go by the owner, negligently runs over a traveller on a street in Boston, who was in the exercise of due care, the owner of the automobile is not liable to the traveller for injuries thus sustained, because the act of the driver was not within the general scope of his employment.

RUGG, J. The plaintiff while in the exercise of due care and travelling on Dartmouth Street opposite the Public Library in Boston was injured by the negligence of one Freeman, who was driving the defendant's motor car. Freeman was not in the general employ of the defendant, but on the day in question had been asked by him to drive the car from the Stevens garage on Winchester Street in the town of Brookline to the shop of one Burlingame on Aspinwall Avenue also in Brookline and less than a mile away, for some repair. Later in the day Freeman took the car, drove first to Coolidge Corner, a square in Brookline, not on the way to the Burlingame shop, where he had lunch. Then with a friend he drove the car about six miles farther out of the way from the garage to the Burlingame shop to a shop on

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Stanhope Street in Boston for the purpose of getting a chain for his own uses. He had started to return to Brookline and was bound for the Burlingame shop when the accident occurred. The defendant gave no directions to go to Coolidge Corner or to Boston, and this ride was taken without his knowledge. Freeman had worked at the Stevens garage where the defendant kept his motor car, and once before had driven it to Boston. but under what circumstances does not appear.

The principles which govern the rights of the parties are settled. The master is liable for the act of a servant in charge of his vehicle when the latter is acting in the main with the master's express or implied authority upon his business and in the course of the employment for the purpose of doing the work for which he is engaged. The master is not liable if the servant has abandoned his obligations, and is doing something not in compliance with the express or implied authority given, and is not acting in pursuance of the general purpose of his occupation or in connection with the doing of the master's work. Under this rule the employer has been held responsible for wrongs done to third persons by his driver during incidental departures from the scope of the authority conferred by the employment and upon comparatively insignificant deviations from direct routes of travel, but within the general penumbra of the duty for which he is engaged. *Hayes* v. *Wilkins*, 194 Mass. 223. The employment of Freeman was limited to a specific and short trip within a town. He took the car several miles out of the way, which was six or seven times as far as he had a right to go, to a crowded part of a large city on an errand wholly of his own, and had only just commenced to return at the time the injury to the plaintiff occurred, for which damages are sought in this action. He was acting in disregard of his instructions, and wholly outside his employment, and for a purpose having no relation even remote to the business of the master. The extent of the excursion which he undertook on his own account was so disproportionate to the length of the route he was authorized to go that it cannot be minimized to a deviation. It was in fact the chief journey. There is nothing to indicate that the defendant had any hint or ground for suspicion of this unwarranted use of his property. Under such circumstances he cannot be held liable. *McCarthy*

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v. *Timmins*, 178 Mass. 378. *Storey* v. *Ashton*, L. R. 4 Q. B. 476. *Mitchell* v. *Crasweller*, 13 C. B. 237.

*Exceptions overruled.**

H. W. Beal, for the plaintiff.

R. E. Buffum, for the defendant, was not called upon.

ANNA W. SCHENCK, administratrix, *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. December 7, 1910. — January 5, 1911.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Practice, Civil, Appeal, Discontinuance. *Police, District and Municipal Courts.*

The defendant in an action brought in a municipal court appealed to the Superior Court from a judgment for the plaintiff, and then failed to enter his appeal in the Superior Court. The plaintiff failed for more than a year to file under R. L. c. 157, §§ 22, 23, a complaint for an affirmation of the judgment of the municipal court. *Held*, that the right of the plaintiff to discontinue his action was the same after the appeal as before, and that his failure seasonably to make a complaint for an affirmation of the judgment was such a discontinuance.

KNOWLTON, C. J. The plaintiff brought an action in the Municipal Court of the City of Boston and obtained a judgment against the defendant. From this judgment the defendant appealed to the Superior Court, but by an oversight failed to enter its appeal. By a like oversight the plaintiff failed to file a complaint for the affirmation of the judgment until after the expiration of a year from the time when the appeal should have been entered. An application for leave to enter such a complaint, filed later, having been denied, the plaintiff brought the present action.† The defendant answered, setting up the former proceedings, and the plaintiff demurred to this answer. The plaintiff having afterwards obtained a verdict, the case is before us upon

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* The case was tried before *Stevens*, J.

† An action of tort for personal injuries, being for the same cause of action for which the first action was brought.

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the defendant's exception to an order * sustaining the demurrer to this answer.

The provisions of the R. L. c. 157, §§ 22, 23, permitting an entry of an appeal or a complaint for an affirmation of a judgment, by leave of court, within a year after the appeal should have been entered and not later, contain a strong implication that a remedy must be sought in this way, if either party, after an appeal, desires to have the case go to judgment. The appeal vacates the judgment, and the statute indicates that, unless the appeal is entered and prosecuted, a complaint must be entered to obtain an affirmation of the judgment, if any effect is to be given to the decision in the lower court. The decisions have settled the law accordingly. *Campbell* v. *Howard*, 5 Mass. 376. *Ewer* v. *Beard*, 3 Pick. 64. *Ball* v. *Burke*, 11 Cush. 80, 82. *Rice* v. *Nickerson*, 4 Allen, 66, 68. *Wells* v. *Stevens*, 2 Gray, 115.

The right of a plaintiff to discontinue his action is the same after an appeal as before. *Derick* v. *Taylor*, 171 Mass. 144. *Carpenter & Sons Co.* v. *New York, New Haven, & Hartford Railroad*, 184 Mass. 98.

The appeal having vacated the judgment in the former action and no further effectual prosecution of that action having followed, it is as if the former action had never been brought. The plaintiff's failure seasonably to make a complaint for an affirmation of the judgment was a discontinuance of the action. No final judgment having been entered in the case, it is not a bar to the present action. See *Curtiss* v. *Beardsley*, 15 Conn. 518.

Exceptions overruled.

C. S. French, for the defendant.

H. E. Perkins, for the plaintiff.

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* Made by *Richardson*, J.

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CARLETON HUNNEMAN *vs.* DELIA C. PHELPS.

Norfolk. December 8, 1910. — January 5, 1911.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Execution, Levy: amendment of return. *Practice, Civil*, Amendment of officer's return.

To constitute a valid levy by a deputy sheriff under an execution upon real estate which previously had been attached in the action in which the execution issued, no more formal overt act is necessary than for the officer to make a memorandum for the levy on a piece of paper and to direct a clerk in his office to make the necessary copies for notice to the judgment debtor and for recording and publication and to prepare the return for the signature of the deputy sheriff.

At the hearing of a motion by a deputy sheriff to amend, so that it would conform to the truth, a return by him upon an execution as to a levy, so that, instead of reading that he levied upon the interest of the debtor in certain real estate as it existed on the date of the levy, it should read that he levied upon the debtor's interest as it was at the time of an attachment thereof made at the commencement of the action, there was evidence tending to show that the attachment had been made, that the execution had been handed to the deputy sheriff with an instruction to levy upon the property attached, the date of the attachment being given to him, that he then had made a memorandum for the levy on the interest of the debtor in the real estate as of the date of the attachment upon a piece of paper, which at the time of the hearing was lost, and had directed a clerk in his office to make the necessary copies for notice to the debtor and for publication and recording and to prepare the return for the signature of the deputy sheriff; that the notice given to the debtor and published in a newspaper stated the levy in accordance with the proposed amended return, and that the return upon the copy of the execution filed in the registry of deeds and upon the original execution stated it as covering the debtor's interest on the later date. The judge found as a fact that the levy was made as stated in the amendment and allowed the motion. *Held*, that the action of the judge was within his power and was warranted.

KNOWLTON, C. J. The question before us arises upon a motion of a deputy sheriff to amend his return upon an execution.*

* This case previously was before this court on exceptions of the defendant taken at the trial and the exceptions were overruled by a decision reported in 199 Mass. 15. A bill in equity afterwards was filed in the name of the same plaintiff but on behalf of a surety company which had signed a bond given by the defendant to pay any judgment that might be rendered in the action, the purpose of the bill being to reach a surplus which the Lowell Institution for Savings held as mortgagee after foreclosing certain mortgages upon real estate of the defendant which had been attached by this plaintiff subject to the mortgages. The suit, after a hearing and decree

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The power of the court to allow an amendment to such a return, for the purpose of making the return conform to the truth, is well established, and is not questioned in this case. *Bayley, petitioner*, 132 Mass. 457. *Sawyer* v. *Harmon*, 136 Mass. 414. *Frazee* v. *Nelson*, 179 Mass. 456, 461. The contention of the defendant is that there was no evidence to warrant the judge * in finding, as a fact, that the levy was made as stated in the proposed amendment.

The amendment changed the original return by making the levy upon the execution cover the interest of the debtor in the real estate on January 19, 1905, the time when the property was attached on mesne process, instead of her interest on June 30, 1908, the day when the levy was made. The notice which was given to the debtor and published in a newspaper stated the levy in accordance with the statement in the amendment. The return upon the copy of the execution which was filed in the registry of deeds, and that upon the original execution, stated it as covering the debtor's interest on the later date.

The officer testified very fully that he levied upon the right of the debtor at the time of the attachment on mesne process, and that when he received the execution he was given the date of the original attachment, and was told to levy upon the property attached. He also said that he made a memorandum for the levy on a paper which has been lost, and that he directed a clerk in his office to make the necessary copies and to prepare the return for his signature. To constitute a valid levy, no more formal overt act was necessary to be proved. *Hall* v. *Crocker*, 3 Met. 245. *Haven* v. *Snow*, 14 Pick. 28, 32. The evidence well warranted the finding of the judge that the statements in the proposed amendment were true.

Motion allowed.

W. B. Luther, for the plaintiff.

A. L. Richards, for the defendant.

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in the Superior Court, was before this court, (see *Hunneman* v. *Lowell Institution for Savings*, 205 Mass. 441, 448,) and was remanded to the Superior Court for further hearing.

* *Dana*, J.

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PATRICK COYLE *vs.* TAUNTON SAFE DEPOSIT AND TRUST COMPANY.

Bristol. October 24, 1910. — January 6, 1911.

Present: HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Savings Bank, Liability of stockholders, Receivership proceedings. *Receiver*.

After a receiver of a trust company has been appointed and has collected practically all of its assets and has distributed to the depositors a dividend comprising a part only of the amounts due to them, so that, in order to pay to the depositors the balance due them, it has become necessary to enforce against the stockholders the liability created by R. L. c. 116, § 30, a depositor, although the receivership proceedings still are pending and the company has in its possession nothing which can be attached or taken on execution, may maintain an action at law against the corporation for the sole purpose of laying the foundation of enforcing under R. L. c. 110, § 60, the liability of the stockholders by recovering a judgment against the corporation, causing a demand to be made on an execution, and the execution to be returned wholly unsatisfied after thirty days.

CONTRACT for an unpaid balance of a deposit of the plaintiff with the defendant. Writ in the First District Court of Bristol, dated December 11, 1909.

On appeal to the Superior Court the case was heard by *Hardy*, J., without a jury, upon an agreed statement of facts.

On a petition of the board of commissioners of savings banks to the Supreme Judicial Court the defendant was placed in the hands of a receiver on February 29, 1904. Previous to December 14, 1909, the receiver in the administration of the defendant's affairs had collected practically all of its assets and had distributed to the depositors, among them the plaintiff, a dividend of seventy-five per cent, and, in order to pay to the depositors the balance still due them, it became "necessary to levy an assessment upon the stockholders of the corporation."

On December 14, 1909, the plaintiff filed the following petition in the receivership proceedings: "And now comes Patrick Coyle of Taunton in said Commonwealth and says that he is a creditor of said trust company; that it appears from the receiver's report that there are not funds enough to pay his claim

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in full; that his claim is a debt or contract for which the stockholders of said company are liable to be assessed; wherefore he prays that he may be allowed to bring suit against said company that he may reduce his claim to judgment for the purpose of finally establishing said stockholders' liability." The petition was allowed and this action was brought. At the time it was brought there were no assets or property in the hands of the defendant. The judge found that the sole purpose of bringing this action was to enforce the liability of stockholders of the defendant.

George B. Baker, one of the defendant's stockholders, was allowed to appear and defend the action.

The trial judge found for the plaintiff; and the defendant alleged exceptions.

G. A. Sweetser, for the defendant.

F. S. Hall, receiver, *pro se*.

LORING, J. After our decision in *Nichols* v. *Taunton Safe Deposit & Trust Co.* 203 Mass. 551, this action was brought against the trust company by one of its creditors to lay the foundation for enforcing under R. L. c. 110, § 60, the personal liability of stockholders created by R. L. c. 116, § 30. The only defense set up here is that before the date of the writ on a petition brought against it under R. L. c. 113, § 6 (which is applicable to trust companies by force of R. L. c. 116, § 37), all the property of the trust company had been put in the hands of a receiver to wind up its affairs and it had been enjoined from the further prosecution of any business. The defendant contends that this defense is good on the authority of what was said by Holmes, J., in *Archambeau* v. *Platt*, 173 Mass. 249, 251: "Apart from the statute, we cannot see how it is possible to justify bringing an action which it is admitted never can result in satisfaction from the defendants." The defendant also relies on *Morse* v. *Toppan*, 3 Gray, 411, 412; *Train* v. *Marshall Paper Co.* 180 Mass. 513; *Norfolk* v. *American Steam Gas Co.* 108 Mass. 404, 407. But the answer to that is that the amendment to R. L. c. 116, § 30, made by St. 1905, c. 228 (authorizing receivers of insolvent trust companies to enforce the personal liability of stockholders which is here in question), of necessity implies that a judgment can be obtained against a trust com-

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pany in the hands of a receiver. We do not intimate that the result would not have been the same before the enactment of St. 1905, c. 228.

Exceptions overruled.

PATRICK CASEY *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

Bristol. October 25, 1910. — January 6, 1911.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Negligence, Railroad.

At the trial of an action against a railroad corporation, operating a train by electricity, for personal injuries alleged to have been caused by the closing upon the plaintiff's fingers of a door between the smoking and baggage compartments of a combination car through which the plaintiff was passing in leaving the train after it had stopped at a station, it appeared that the door had a catch at the bottom designed to hold it open and an arrangement at the top designed automatically to close it when it was not held open, and there was evidence that some one other than an employee of the defendant opened the door, that when the plaintiff reached it it was open and "neither swinging nor moving," and that as he put his hand on the door jamb to steady himself in turning round, no one having touched the door to close it, it came to upon his fingers. There was no direct evidence that the catch was defective. The defendant's baggage master testified that it was his duty to open the door when the train stopped, and that he did not do it on this occasion because it already had been opened. A verdict was ordered for the defendant. *Held*, that the verdict was ordered rightly, because on the evidence it was conjectural whether the door swung to because of a defect in the catch or because it was not properly set on the catch by the person who opened it, and because there was no evidence that the baggage master was under any duty to see that the door was set back properly when it was opened by some one other than an employee of the defendant.

TORT for personal injuries alleged to have been caused by the closing upon the plaintiff's fingers of a door between the smoking and baggage compartments of a combination car of a train run by the defendant upon its electric railroad between Warren, Rhode Island, and Fall River, as the plaintiff was passing through the door on his way to leave the train after it had stopped at a station. Writ in the Second District Court of Bristol dated July 30, 1907.

On appeal to the Superior Court, the case was tried before

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Schofield, J., who at the close of the evidence ordered a verdict for the defendant; and the plaintiff alleged exceptions.

The facts are stated in the opinion.

E. F. Hanify, for the plaintiff.

T. J. Feeney, (*F. S. Hall* with him,) for the defendant.

LORING, J. In this case the plaintiff, while passing through the forward door of a combination car in alighting at his destination, put his hand on the jamb of the door to steady himself in turning round, when the door closed on his fingers. It appeared that in the top of the door there was an arrangement which automatically closed the door and at the bottom a catch designed to hold it open. The door was open when the plaintiff reached it and was neither swinging nor moving and the train was then at a standstill. A companion of the plaintiff got off immediately before the plaintiff, and this companion, called by the plaintiff, testified that an unknown man and a newsboy got off ahead of him and that the door was opened by the newsboy. The forward part of the combination car here in question was used as a baggage car. The baggage master, called by the plaintiff, testified that he did not open the door in question; that there was no newsboy on the train, and that he was "most sure" that the door was opened by the plaintiff's companion; that the plaintiff's companion was the first to go out, then the plaintiff, and then an unknown man who said he "didn't pull the door on to his [the plaintiff's] fingers." The plaintiff testified (as we understand the bill of exceptions) that "two or three people went out ahead of" him, and that he was the last passenger out of the car. The only other person in the car was the motorman, and it was admitted that he remained in his box. There was no evidence that the door was opened by an employee of the defendant and there was no direct evidence that the catch was defective.

On this evidence there was no more reason to suppose that the door swung to because of a defect in the catch than to suppose that it was not properly set on the catch when opened by one of the persons who got off before the plaintiff; and therefore no case of negligence on the part of the defendant was made out. *Faulkner* v. *Boston & Maine Railroad*, 187 Mass. 254. *Hunt* v. *Boston Elevated Railway*, 201 Mass. 182.

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The plaintiff has argued that he was entitled to go to the jury because the baggage master testified that it was his duty to open the car door when the train stopped and that he did not do it on this occasion because it had been opened before the train stopped. And further that if the door was opened by a passenger it was the defendant's duty to see that it was properly set back on the catch. We have examined the cases cited in support of these contentions and find nothing in them that helps the plaintiff. We are of opinion that the judge was right in directing a verdict for the defendant.

Exceptions overruled.

WALTER S. HODGDON *vs.* EDWIN H. MOULTON & others.

Essex. November 1, 1910. — January 6, 1911.

Present: KNOWLTON, C. J., HAMMOND, LORING, SHELDON, & RUGG, JJ.

Municipal Corporations.

If the municipal council of a city in conducting the affairs of the public act with ill-will toward a certain individual instead of acting only with a due regard to the interests of the public, this does not give the subject of their ill-will a cause of action in tort against the members of the council, who are answerable only to the public in conducting public affairs.

LORING, J. This action is entitled an action of tort. It is brought against the members of the municipal council of the city of Haverhill. As to which see St. 1908, c. 574, §§ 3, 20–33. The members filed a demurrer, the demurrer was sustained * and judgment was entered in favor of the defendants. The case is here on the plaintiff's appeal from that judgment.

The case stated by the plaintiff is entirely without foundation and under ordinary circumstances could be properly disposed of without more on stating that fact. But it is manifest that the plaintiff feels that he has been aggrieved by the defendants and that these grievances of his did not receive due consideration in the Superior Court. We have thought it wise under all the circumstances to add some words of explanation although they

* By *Schofield*, J.

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are so obvious that under ordinary circumstances they should be omitted.

The grievance alleged by the plaintiff is that the defendants having promised under oath to faithfully perform their duties as members of the municipal council, "regardless of their said oaths, and on account of political maleficence, . . . have substituted paritality [partiality], collusion and anarchy, and abridged plaintiff's constitutional privileges and immunities" in eight particulars, to wit: (1) He filed a petition with the defendants for the restoration of the old rates for street watering and it was denied without giving him a hearing; (2) he filed a petition for the removal of a police officer because (so the plaintiff stated) he had committed an unprovoked assault upon him and offered him an unprovoked insult; and this petition was denied without giving him a hearing; (3) he filed a petition for abatement of a street watering tax in excess of the old rates and this was put on file "and he was not legally notified"; (4) the defendants allowed the friends of one Greul to stamp their feet and clap their hands at a hearing on a petition brought by Greul; (5) an ordinance was "filed" by the plaintiff dealing with charges to be made by "plumbers *et alii*" and this petition was put on file "and the plaintiff was not legally notified"; (6) on petition of one Ballard for an increase in hack fares the defendants voted "to grant the prayer after the city solicitor should change the ordinance"; (7) the plaintiff demanded a hearing on his petition as to "plumbers *et alii*" and this demand was put on file; and (8) the plaintiff "says that he never seeks trouble but is liable to defend his rights; that on account of political malice, the defendants have held his rights in contempt; that their examples have caused him to be insulted on the streets by persons whose names were unknown, and without any provocation, and his property has been despoiled."

The substance of these alleged grievances is that in conducting the affairs of the city which have been committed into their charge by the voters of Haverhill the defendants in the first place refused to adopt the views put forward in petitions filed with them by the plaintiff, and have done so without giving him a hearing; and in the second place in acting as they did on the plaintiff's petitions not only have they not acted impartially but

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they have acted from ill-will toward him, as is shown by the way in which they have treated Greul and Ballard. But the difficulty in the way of the plaintiff's recovering damages from the defendants for acting in these matters with ill-will toward him is that the matters in which they were acting were the affairs of the public and the plaintiff had no right to have his views in those affairs adopted by the defendants. If the defendants in conducting those affairs acted out of ill-will to the plaintiff in place of acting from a due regard to the interests of the public, they are answerable to the public but not to the plaintiff.

The entry must be

Judgment affirmed.

W. S. Hodgdon, pro se.

G. M. G. Nichols, for the defendants, did not care to be heard.

CHARLES T. WORK *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Essex. November 2, 1910. — January 6, 1911.

Present: KNOWLTON, C. J., HAMMOND, LORING, SHELDON, & RUGG, JJ.

Negligence, Street railway.

Statement by LORING, J., of the principles of law governing the liability of companies operating electric cars for injuries caused to passengers by jerks occurring when cars are stopped or started, jolts occurring as cars are run over switches or frogs, and lurches occurring as cars are run around curves, with a collection of the recent decisions of this court on the subject.

In an action by a passenger against a street railway company for personal injuries caused by the sudden starting of a car as the plaintiff was walking toward the door preparing to alight, there was evidence tending to show that, when there were but two persons on the car, the plaintiff had signalled the conductor to stop the car and the conductor had assented; that, after the car had stopped, the other passenger got off first and the plaintiff, having gathered his bundles together under his right arm, started for the door when, seeing the conductor reach for the bell rope to signal for the starting of the car, he seized a hanging strap with his left hand with a "pretty good hold" before the car started in order to guard against being thrown, but that the car was started with such a "jump," that the plaintiff lost his hold upon the strap, was "twisted" around and "landed right down in the corner" eight or ten feet away. *Held*, that,

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while the conductor's negligence in starting the car under the circumstances before the plaintiff had alighted did not cause the injury to the plaintiff because the plaintiff had warning of it and an opportunity to steady himself against an ordinary starting of the car, and while there was no direct evidence as to what the motorman did in starting the car, there was, in the effect upon the plaintiff, indirect evidence that the car was started negligently; and that therefore the case was for the jury.

TORT for personal injuries received as the plaintiff was leaving a closed electric car of the defendant on Highland Avenue in Somerville, as stated in the opinion. Writ dated April 6, 1908.

In the Superior Court the case was tried before *Morton*, J., who, at the close of the plaintiff's evidence, ordered a verdict for the defendant; and the plaintiff alleged exceptions.

The facts are stated in the opinion.

W. J. Corcoran, (*M. F. Cunningham* with him,) for the plaintiff.

E. P. Saltonstall, for the defendant.

LORING, J. It is settled that jerks while running, jerks in stopping and starting to let off and take on passengers, jolts in going over frogs or switch points, and lurches in going around curves are among the usual incidents of travel in electric cars which every passenger on them must expect to encounter, and that if a passenger is injured by such a jerk, jolt or lurch the company is not liable. On the other hand an electric car can be started and stopped, for example with a jerk so much more abrupt and so much greater than is usual that the motorman can be found to be guilty of negligence and the company liable. The difference between the two cases is one of degree. The difference being one of degree and one of degree only, it is of necessity a difficult matter in practice to draw the line between these two sets of cases in which opposite results are reached. No general rule can be laid down. Each case must be dealt with as it arises.

But some points are settled. It is settled that it is not enough for a plaintiff in such a case to introduce the testimony of witnesses who characterize the jerk as an unusual one or as worse than unusual. *Foley* v. *Boston & Maine Railroad*, 193 Mass. 332. *Sanderson* v. *Boston Elevated Railway*, 194 Mass. 337. *McGann* v. *Boston Elevated Railway*, 199 Mass. 446. *Olund* v. *Worcester Consolidated Street Railway*, 206 Mass. 544. The plaintiff to

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make out a case must go further than merely to characterize the jerk, jolt or lurch and must show (1) by direct evidence of what the motorman did that he was negligent in the way that he stopped or started the car (as in *Cutts* v. *Boston Elevated Railway*, 202 Mass. 450), or (2) by evidence of what took place as a physical fact, (as in *Lacour* v. *Springfield Street Railway*, 200 Mass. 34; *Black* v. *Boston Elevated Railway*, 206 Mass. 80;) or by evidence of what appeared to take place as a physical fact, (as in *Nolan* v. *Newton Street Railway*, 206 Mass. 384) show indirectly that the motorman was negligent. The earlier cases are collected in *McGann* v. *Boston Elevated Railway*, 199 Mass. 446. The cases which have been decided since then are *Stevens* v. *Boston Elevated Railway*, 199 Mass. 471; *Lacour* v. *Springfield Street Railway*, 200 Mass. 34; *Hunt* v. *Boston Elevated Railway*, 201 Mass. 182; *Cutts* v. *Boston Elevated Railway*, 202 Mass. 450; *Tupper* v. *Boston Elevated Railway*, 204 Mass. 151; *Black* v. *Boston Elevated Railway*, 206 Mass. 80; *Nolan* v. *Newton Street Railway*, 206 Mass. 384; *Olund* v. *Worcester Consolidated Street Railway*, 206 Mass. 544.

The plaintiff's story in the case at bar is that he told the conductor when he boarded the car in question that he wanted to get off at a real estate office, and that later on, seeing the sign of a real estate office, he "motioned" to the conductor to stop and the conductor nodded to him in answer. At that time he was seated at the forward end of the car on the right hand side. The car was a thirty-foot car with seats on each side running lengthwise of the car. He then turned and gathered up some tin signs which lay on the seat beside him. He took them in his right hand and proceeded to the rear door to alight. The car was then at a standstill. The conductor was on the platform and with his right hand was helping a woman get off the car; that he had his left hand on the bell rope apparently ready to ring the bell to start the car as soon as the woman had stepped off. The plaintiff was then eight or ten feet from the rear door. Seeing that the conductor was looking at the woman and not at him and anticipating that the car would be started before he got to the platform he "grabbed" a strap with his left hand, when "the car started instantly with a tremendous jump, it shot right forward and I lost my hold on the strap and

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I twisted myself and I landed right down in a corner on the opposite side from where I was standing," eight or ten feet away. "I struck on the corner of the seat right up on the left side of my head." The plaintiff further testified that the car was not in motion when he took hold of the strap and (to quote his own words) "I took a pretty good hold on it because when I see him reach for the bell I thought the car would start."

There was evidence of negligence on the part of the conductor in that he rang for the car to go ahead without waiting for the plaintiff to get off after the plaintiff had "motioned" to him to stop and he had nodded in answer. But that negligence was not the cause of the injury which the plaintiff suffered. The plaintiff saw that the car was about to be sent forward by the conductor; he had time while the car was standing still to take hold of a strap to steady himself as the car went forward, and he did so. If the car went forward with no more than the usual jerk he has no remedy. His right to recover depends upon the way in which the car was started by the motorman.

There is no direct evidence as to what the motorman did in starting the car. But there is indirect evidence that the motorman was negligent in the way he started the car in the fact that although the plaintiff took hold of the strap to steady himself on the starting of the car while it was standing still, and got a "pretty good hold," he was thrown eight or ten feet and struck on the corner of the seat on the side of his head.

In *Stevens* v. *Boston Elevated Railway*, 199 Mass. 471, the plaintiff's hold on the handle of the car was broken, and in spite of that fact it was held that the evidence did not warrant a finding of negligence on the part of the motorman in starting the car. The trouble with the plaintiff's case there was that he had got down on to the step to get off, thinking that the stopping place was on the nearer in place of the farther side of Dartmouth Street, and that he thought that when the car slowed down before crossing the tracks on Dartmouth Street it was slowing down to stop for passengers to alight. The fact that under these circumstances the plaintiff had hold of the handle of the car did not justify the inference that the hold taken was a good enough one to guard against the usual jerk incident to a car starting forward; while in the case at bar the plaintiff's hold

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on the strap was taken when the car was at rest because the plaintiff was afraid that the car was about to start forward. Under these circumstances the jury were justified in thinking that the hold taken was good enough to guard against the usual jerk incident to a car starting forward and in that it was corroborated by the plaintiff's testimony that his hold was a pretty good one.

There was no evidence that there was any other passenger on the car.

We are of opinion that this evidence warranted a finding that the motorman was negligent in the way he started the car and the entry must be

Exceptions sustained.

DON M. INGRAHAM, administrator, *vs.* BOSTON AND NORTHER STREET RAILWAY COMPANY.

SAME *vs.* SAME.

DON M. INGRAHAM *vs.* SAME.

Essex. November 3, 1910. — January 6, 1911.

Present: KNOWLTON, C.J., HAMMOND, LORING, SHELDON, & RUGG, JJ.

Negligence, Imputed, Of person in charge of child, Street railway.

At the trial of actions against a street railway company for the conscious suffering and death of a girl three years and four months of age, caused by her being run over by a street car, there was evidence tending to show that, on the day in question the child had been with her mother until a little before 11 A.M., while the mother was doing her housework, that then she was allowed by her mother to go out and play in a yard in front of her home with a boy acquaintance four years and three months of age, they being constantly within the mother's view from the window, that the yard was enclosed on three sides but was open on the side of the street, which was an ordinary village street not thickly settled, along which ran a single street railway track on the other side of the street from the child's home where cars passed half hourly, that the mother repeatedly had instructed the child not to leave the yard, and had explained to her the dangers of doing so, and that the child never before had disobeyed, that at five minutes before eleven the mother looked out of the window into the yard and the children then were playing there, that thereafter the children without the knowledge of the mother left the yard, went eight hundred feet down the street into a yard where workmen were felling trees, and were at once warned to move out of the way of the trees, that the girl went out of the yard into the street, where she was run over by the car about ten minutes after her mother last had seen her in the yard. *Held*, that there was evidence of due care on the part of the girl's mother.

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At the trial of actions against a street railway company for the conscious suffering and death of a girl three years and four months of age, caused by her being run over by an electric street car of the defendant, it appeared that the accident happened on an ordinary village street, not thickly settled, where there was a single straight track. Two persons in a yard beside the track, who were engaged in cutting down a tree, testified that they saw the child standing near and warned her away, that she thereupon left the yard and went out upon the track on her way home, the car then being about one hundred and fifty feet away, and that there were no leaves on the track. One of the men testified that when he last saw the child, just before the accident, she was walking along the track with her back toward the car, and that the motorman, as he approached, was not looking at the track but at the men chopping the tree. The motorman testified that he saw the child approaching the track when he was from one hundred and fifty to two hundred feet away, and saw her on the track when he was one hundred and twenty-five feet away, and that then the car was running about four and a half miles an hour on a slight down grade, that he put on the brakes and reversed the car, but could not stop in time because the rails were slippery owing to the presence of leaves, that the brakes and reverse were in good order, and that by tests made by him after the accident he found that the car, when going four miles an hour on a grade, could be stopped in about twenty-five feet. *Held*, that the jury would have been warranted in believing the motorman's testimony as to the distance he was from the child when he first saw her and as to the distance within which the car under like conditions of grade and speed could have been stopped if the tracks were not slippery and the stopping gear were in good order, and the testimony of the men who were cutting the tree that there were no leaves on the track, and therefore would have been justified in finding that the brakes or reversing machinery of the car were out of order and that the defendant as a corporation was negligent; or that the jury might have disbelieved the motorman's testimony as to his effort to stop the car and have believed that the brakes and reversing machinery were in good order, that the car might have been stopped within twenty-five feet, that there were no leaves on the rails, and that the motorman saw the child with her back toward the car in time to prevent the accident, in which case they would have been warranted in finding the motorman guilty of gross negligence.

THREE ACTIONS OF TORT growing out of an accident which resulted in the death of the plaintiff's child, Doris, a little girl three years and four months of age. Two of the actions, in which the plaintiff sued as administrator, were brought to recover for the death and the conscious suffering of his intestate. The third action was brought by the father to recover for loss of services and for expenses due to the injury. Writs dated October 29, 1906.

In the Superior Court the three cases were tried together before *Lawton*, J. There was evidence tending to show the following facts:

Doris Ingraham, who was three years and four months of age, lived with her father and mother on Salem Street in the town of

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Lynnfield. There were two other children in the family, one old enough to be at school and the other a baby. The father worked in Peabody, and was accustomed to leave home in the morning at six o'clock, and not to return until half-past six in the afternoon. The mother did her own housework and took care of her children.

There was a single track of the defendant's railroad on Salem Street, over which it operated cars between North Saugus and Salem. The cars ran each way once an hour. The street was an ordinary village street, not thickly settled, and the tracks were on the opposite side of the street from the Ingraham house.

The accident happened at about eleven o'clock in the forenoon of October 7, 1906. A little before eleven the mother was upstairs, sweeping a chamber, and Doris was in the same room, playing with the baby. Just before eleven Doris looked out and saw a little boy named Newhall, four years and three months old, in the yard, and said to her mother that she was going down to play with him. A little later the mother went downstairs, and, looking out of the window, saw Doris playing with the boy in the yard. It was then five minutes of eleven. The mother then sat down to rock her baby to sleep. She did not see Doris leave the yard, and did not know she had left it until she was brought home after the accident, a little after eleven. She repeatedly had instructed the child not to leave the yard, and had explained to her the dangers there were in the street from cars and automobiles. She never had known of her going out into the street alone before.

The yard was surrounded by a wall on three sides, but had no fence or wall on the Salem Street side, where it was open to the street. It appeared that the two children, Doris and the Newhall boy, left the yard and went down the street about eight hundred feet to a place where two men were cutting down an apple tree in a yard on the other side of the street. They went through the gate, into this yard when the tree was nearly ready to fall, and one of the workmen told them to move out of the way. Thereupon Doris went out of the gate and started back toward her home. In doing so she went diagonally across the track, which was on that side of the street, about eight feet from

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the wall. When she started across toward the track, the car was about one hundred and fifty feet away. The track was nearly straight and slightly down grade. The car was going slowly, — the motorman testified about four miles an hour. One of the men cutting the tree testified that the motorman was looking toward him and the tree, and that before the accident the child was walking with her back toward the approaching car.

The motorman testified that he saw the child in the gutter beside the track approaching the track, when he was from one hundred and fifty to two hundred feet away and saw her on the track when he was one hundred and twenty-five feet away from her and with his car going about four and a half miles an hour. He said he put on his brake and also attempted to stop this slowly moving car with the reverse, but failed to do so and ran over the child. There was evidence that, when the car was finally brought to a stop, the child was under the rear fender, that her body was then about eight or nine feet from where it was first struck and had been carried along that distance by the car. The car was from twenty to twenty-five feet long.

There was evidence of experiments made by the motorman after the accident, from which the jury properly might have inferred that with the brakes in good condition the car, when going four miles an hour on a slight grade, should have been stopped in about twenty-five feet. The motorman ascribed his failure to stop the car on this occasion to the fact that there were leaves on the track which rendered it slippery; but two witnesses for the plaintiff testified that there were no leaves on the track that day and no signs of their having been any. There was evidence that the motorman did not sound his gong. Although he testified that there was sand on the car which was intended to be used on slippery rails, he made no effort to use it.

At the close of the evidence, the defendant asked the judge to rule as follows:

"1. There is no evidence which would warrant a finding that the defendant failed to provide proper brakes or other appliances for bringing its car to a stop.

"2. There is no evidence which would warrant a finding that the defendant's servants were grossly negligent.

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"3. There is no evidence which would warrant a finding that the equipment of the defendant was in any respect defective.

"4. Upon all the evidence the plaintiff is not entitled to recover."

The rulings were refused and a verdict was returned for the plaintiff in each case. The defendant alleged exceptions.

J. P. Sweeney, for the defendant.

G. L. Mayberry, (*J. D. Upton* with him,) for the plaintiff.

LORING, J. 1. So far as due care on the part of the child's mother goes these cases come within *Hewitt* v. *Taunton Street Railway*, 167 Mass. 483, and not within the later case of *Cotter* v. *Lynn & Boston Railroad*, 180 Mass. 145. The age of the child in *Hewitt* v. *Taunton Street Railway* was the same as that of the child in these cases. The yard in question in that case had a fence "with gates opening" on one of the main thoroughfares in the city of Taunton, while in these cases the yard had no fence on the side next to Salem Street, but Salem Street was "like the ordinary village street, not thicky settled." There both parents were in the house and one of them had looked at the child in the yard fifteen minutes before the accident, while in these cases the mother looked at the child in the yard not more than ten minutes before the accident happened. In addition there were facts here which help the plaintiff that did not exist there. The child in these cases was playing with another somewhat older child and had been "always" instructed by her mother not to leave the yard, an instruction which had been repeated on the morning of the accident and one which up to that time never had been disobeyed. The principal difference between these cases and *Cotter* v. *Lynn & Boston Railroad* lies in the fact that in that case an hour to an hour and a half (in place of ten minutes) had elapsed between the time when the mother last looked to see if the child was still in the yard and the time of the accident; and there are some minor differences in addition between the two cases. There was therefore evidence of due care on the part of the child's mother.

2. If the jury believed (1) the motorman's story as to what he did after he first saw the child one hundred and fifty to two hundred feet away, (2) his testimony that such a car as the car here in question under like conditions could be stopped in twenty-

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five feet, and (3) the testimony of Cornell and Legrow that there were no leaves on the rails, the only explanation of the car not having come to a stop before it ran over the child was that the brakes or the machinery to start the reverse or both were out of order. The motorman's story was that the car was going four miles an hour when he first saw the child one hundred and fifty to two hundred feet away; that he immediately began to put on his brakes and "the reverse" alternately and kept doing so, but that the car kept going four miles an hour until it ran over the child. There was therefore evidence of negligence on the part of the corporation.

3. But the jury were not bound to believe the motorman's story that he put on the brake and the machinery to put on the "reverse" continuously after he discovered the child one hundred and fifty to two hundred feet away. *Hankinson* v. *Lynn Gas & Electric Co.* 175 Mass. 271. If they did not believe that part of his story and did believe (1) his testimony that the brake and the machinery to put on the reverse were in good order, (2) his testimony that the car in question, under the conditions which then obtained, could be stopped in twenty-five feet; (3) the testimony of Cornell and Legrow that there were no leaves on the rails; and (4) that the child (who was a very young one and so incapable of taking care of herself) was walking with her back toward the car, they were warranted in finding that he was guilty of gross negligence, if indeed any other conclusion is possible.

In all but two of the cases cited by the defendant in which it was held that there was no evidence of gross negligence (*Brennan* v. *Standard Oil Co.* 187 Mass. 376, *Manning* v. *Conway*, 192 Mass. 122, *Dimauro* v. *Linwood Street Railway*, 200 Mass. 147) the accident happened by the person killed unexpectedly putting himself in the place of danger. There is nothing in the other two (*Pearlstein* v. *New York, New Haven, & Hartford Railroad*, 192 Mass. 20, *Lanci* v. *Boston Elevated Railway*, 197 Mass. 32) which helps the defendant. There was therefore evidence of gross negligence on the part of the defendant's servants.

The entry must be

Exceptions overruled.

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MARIE KINGSTON *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. November 9, 1910. — January 6, 1911.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Negligence, Street railway: violation of rule by conductor.

At the trial of an action against a street railway company for personal injuries alleged to have been due to the plaintiff slipping on the step of a closed electric car of the defendant because of an accumulation of mud and slime thereon, there was evidence of the presence of the mud on the step when the plaintiff entered the car and when she left it a mile farther on, and that the defendant had made rules and given instructions to the conductor in charge of the car in question making it his duty to clean the step and put upon it sand provided for the purpose whenever that was necessary to prevent passengers from slipping, even if the slippery condition was caused by the natural tracking of mud upon the steps during the trip of the car. *Held*, that there was evidence of negligence on the part of the conductor in failing to obey the rules of the company and the instructions given to him.

TORT for personal injuries due to the plaintiff slipping on the step of a closed electric car of the defendant as she was leaving the car, and alleged to have been caused by mud and slime negligently allowed to remain on the step. Writ in the Superior Court dated March 15, 1907.

The case was tried before *Crosby*, J. Besides those stated in the opinion, the following facts were in evidence:

The plaintiff testified that she took the car in question at Roxbury Crossing in Boston to go to Jamaica Plain, and noticed mud and slime on the step both as she entered the car and when she was leaving it at the corner of Creighton Street and Centre Street in Jamaica Plain, which was about a mile from Roxbury Crossing.

There was in evidence a rule of the defendant reading as follows: "Conductors must see that their cars are always in proper condition for passengers, and when necessary at the end of each trip sweep them out and dry the seats of open cars."

The conductor, besides testifying as stated in the opinion, testified that, "if there had been mud or slime on the step at Roxbury Crossing it would have been his duty to have scraped it off."

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There was a verdict for the plaintiff; and the defendant alleged exceptions.

L. R. Chamberlin, for the defendant.

R. H. Sherman, for the plaintiff.

LORING, J. The plaintiff in this case testified that in alighting from one of the defendant's cars between three and four o'clock in the afternoon of February 16, 1907, she slipped on slime or mud which she testified "was on all the step" and was an inch thick. The only exceptions now before us are exceptions taken to the refusal of the trial judge to direct a verdict for the defendant and to rule that on all the evidence there was no evidence of negligence of the defendant or of its servants. The ground on which the defendant now seeks to support these rulings is that the car in question was taken out of the barn at Forest Hills at two o'clock and that it was then clean; that the accident happened on the second trip out from Boston; that on the whole of the first trip in to Boston and out to Forest Hills the step in question was not used, it being on the left side of the car which was run on a double track; and that this step did not begin to be used until the crew changed ends at Forest Hills at the end of the first round trip. The argument put forward is that the slime or mud must have accumulated during this second trip and that a carrier cannot be held to be negligent for the natural tracking of mud upon its vehicle during the course of a journey.

There are some indications in the bill of exceptions that the case was tried on the footing that the car did leave the car barn at Forest Hills at two P. M.; that it was then clean, and that the condition of the step, if it was muddy, came from the mud tracked in upon it on the second round trip. We therefore consider the case on that footing in spite of the fact that this evidence came from one of the defendant's witnesses and might have been disbelieved within the rule in *Lindenbaum* v. *New York, New Haven, & Hartford Railroad*, 197 Mass. 314. Even under these circumstances we are of opinion that it could not be ruled as matter of law that there was no evidence of negligence on the part of the defendant.

The proposition of law on which the defendant relies finds support in *Riley* v. *Rhode Island Co.* 29 R. I. 143. But we do not find it necessary to pass upon it in this case.

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In this case the conductor of the car in question testified "that he did not clean the step when he got to Park Street on his first trip, although it would have been his duty to clean it off if it had been slippery and slushy; if it had been muddy and slippery and slushy so that a person might slip on it, he certainly would clean the step off if he could. . . . That the only broom was at Forest Hills, — he did not think there was one at Park Street, that if he saw the steps were dirty, slushy and slippery for passengers, he would get down and scrape them off with his foot. On a day like that there is a little sawdust at Park Street, and he had often taken sawdust and put it down, and it was a rule of the company that he should keep the steps in a safe condition, and it was his duty to do that if it was in an unsafe condition. . . . He didn't remember when he looked at them if there had been slush and mud and a slippery condition; that he would clean it off, scrape it off with his foot if there had been mud there; that he didn't think he had scraped it off at any time that afternoon, because it wasn't necessary, although he did not remember now whether he did or not. If it had been in a slippery condition even if he had scraped it off he would have put sand on there from the sand box in the left hand rear corner under the seat; he would have put sawdust on at Park Street. At Park Street it was his duty to get off the car on to the platform first, and if the step had been slippery he would have taken a handful of it and scattered on to the steps; that he could not remember whether he did or not on the day of the accident."

On this evidence the jury were warranted in finding that the defendant had made it the duty of the conductor to clean the step and put sand on it provided for the purpose, whenever that was necessary to prevent passengers from slipping even if the slippery condition was caused by the natural tracking of mud on the journey. That brings this case within the principle of *Stevens* v. *Boston Elevated Railway*, 184 Mass. 476.

Exceptions overruled.

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LUCY WRIGHT *vs.* CITY OF CHELSEA.
BERTHA MURRAY *vs.* SAME.

Suffolk. November 10, 1910. — January 6, 1911.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Pleading, Civil, Declaration. *Shade Trees. Practice, Civil*, Exceptions, Conduct of trial. *Way*, Public, defect in highway.

Where in an action of tort the defendant did not demur nor ask for specifications in regard to the allegations in the declaration, he cannot raise objections to irregularities of form in the declaration for the first time at the close of the evidence at the trial.

Review by RUGG, J., of the statutes and decisions relating to shade trees.

Statement by RUGG, J., of the respective duties imposed by our statutes on tree wardens, foresters and park commissioners in regard to shade trees, bushes and trees other than shade trees in towns and cities.

Where the trial of an action of tort against a city is conducted upon an interpretation of the statutes affecting the liability of the defendant which is more favorable to the defendant than the true interpretation, the defendant cannot take advantage of an error in any ruling or instruction which is erroneous by reason of the mistake in its favor.

If a traveller on a highway of a city, while in the exercise of due care, is injured by the falling upon him of a limb of a shade tree, which has been so dangerous by reason of decay that the likelihood of its being blown down by ordinary winds has attracted attention for more than a year, and if the officer whose duty it was to report such a danger to the proper city authorities never has done so, and no attempt has been made to guard the place or to inform the public of the peril, in an action by the traveller against the city for the injuries thus received, it can be found that the injuries were caused by a defect in the highway for which the defendant is liable.

No exception lies to the exclusion of a question to a witness where no statement was made of the answer expected.

The exclusion of questions to a witness likely to lead into collateral matters and to divert attention unduly from the material issues on trial is within the discretion of the presiding judge.

TWO ACTIONS OF TORT, each against the city of Chelsea, for personal injuries alleged to have been sustained by the respective plaintiffs on October 8, 1907, on a public highway of the defendant called Sixth Street, from the falling upon the plaintiffs of a large limb of a tree that long had been in a dangerous condition, of which the defendant had notice. Writs in the Municipal Court of the city of Boston dated January 14, 1908.

On appeal to the Superior Court the cases were tried to-

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gether before *Sanderson*, J. There was evidence warranting the finding of the facts which are stated in the opinion.

At the close of the evidence the defendant asked the judge to give to the jury, among others, the following instructions:

"1. That the defendant cannot be held responsible in this form of action because its proper officers did not take any precaution to safeguard the people travelling upon the street in question from the danger of the limb in question falling.

"2. The plaintiffs cannot recover merely because of the fact that the tree in question was defective in the manner set forth in the plaintiffs' declarations.

"3. Upon all the evidence in the case, a verdict must be for the defendant."

The judge refused to give these instructions, except the second, which, as stated in the opinion, was given in substance.

The defendant excepted to a portion of the charge, wherein the judge instructed the jury that they had a right to consider whether or not any safeguard had been made use of to protect the people travelling upon the street in question, and also, that they had a right to consider whether or not some application had been made to the proper authorities for the removal of the tree or limb in question.

The jury returned a verdict for the plaintiff in each of the cases, in that of Lucy Wright in the sum of $490 and in that of Bertha Murray in the sum of $1,500. The defendant alleged exceptions.

S. R. Cutler, for the defendant.

W. H. Brown, for the plaintiffs.

RUGG, J. These are actions to recover for injuries received by the plaintiffs while travelling upon a public way in the defendant city by the fall of a limb of a shade tree which stood within the limits of a public way, and which had been for more than thirty years under the care of the defendant.

There was evidence sufficient to support a finding that the plaintiffs were in the exercise of due care, and that the limb had been so dangerous by reason of decay and consequent liability to be blown down by ordinary winds as to attract attention for more than a year. While the declaration might have been more exact in its averments, it is susceptible of the con-

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struction that the plaintiffs alleged as the ground of their actions a defective condition of a public way arising from the long continuance of a tree dangerous in respect of a decayed limb, the fall of which injured them. In the absence of a demurrer or motion for specifications by the defendant, it cannot now rely upon technical irregularities in the form of a declaration, to which attention is not called until the close of the evidence.

Statutes respecting the care and responsibility for the condition of shade trees by municipalities have been several times the subject of judicial inquiry. In *Chase* v. *Lowell*, 149 Mass. 85, all the statutes up to that time, including St. 1885, c. 123, were reviewed, and the conclusion was reached that a highway surveyor in a city or town had no power summarily to remove a shade tree standing in the highway, but that the question, whether such tree incommoded or endangered travellers and ought to be removed, should be determined by the adjudication of a tribunal designated by the statute for that purpose. The same case was again before the court in 151 Mass. 422, where the duty of the highway surveyor, as to a dangerous shade tree in a public way, to apply to the authorities for an adjudication, was emphasized, and the municipality was held liable for injury to a traveller if after notice of such dangerous tree the highway surveyor took no action. This case related to the removal and not to the trimming of a shade tree. The subject was again discussed in *Washburn* v. *Easton*, 172 Mass. 525, where the town was exonerated from liability for injuries resulting from shade trees in healthy condition set out under the direction of public authorities. Statutes respecting shade trees have been enacted since 1885, some of which were adverted to in *Sharon* v. *Smith*, 180 Mass. 539, *Hall* v. *Wakefield*, 184 Mass. 147, *Commonwealth* v. *Morrison*, 197 Mass. 199, 205, and *Commonwealth* v. *Byard*, 200 Mass. 175. St. 1890, c. 196, St. 1891, c. 49, St. 1892, c. 147, and St. 1893, c. 403, relate only to the designation and marking of trees, standing in highways, as public shade trees, by boards of aldermen and selectmen, and to penalties for injuries to trees. St. 1893, c. 423, § 26, committed to the superintendent of streets in towns, under the direction of the selectmen, "the care and preservation of shade trees." St. 1896, c. 190, was an enabling act merely, and authorized towns to elect a tree warden and

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conferred upon him, if elected, "full care and control of all public shade trees." St. 1897, c. 254, was also permissive, and by § 2 provided for the appointment of a forester in towns which accepted its provisions, to have "charge of all trees" within the public ways, whether shade trees or not, with all the powers of a tree warden. St. 1897, c. 428, § 1, imposed upon "tree wardens or park commissioners, when chosen in towns . . . full care and control of all public shade trees." It would not have been strange if voters and officers in towns may have been somewhat perplexed as to the effect of these several enactments. But it is not necessary to harmonize them, for by St. 1899, c. 330, certain laws relating to shade trees were codified. The election of a tree warden by towns was made compulsory, and his duties and powers were enlarged and defined. By implication St. 1898, c. 423, § 26, St. 1896, c. 190, and St. 1897, c. 428, were repealed. St. 1890, c. 196, and St. 1891, c. 49, were repealed as to towns, because by St. 1899, c. 330, § 2, all shade trees standing within the limits of ways in towns were made public shade trees, and hence there was no occasion for special provision as to designating and marking. St. 1899, c. 330, however, conferred upon the tree warden jurisdiction of public shade trees alone. Hence in towns which had accepted St. 1897, c. 254, respecting a forester, that officer still had charge of bushes and trees other than shade trees within public ways, but in towns where there was no forester, the tree warden alone had authority to trim, cut down and remove such other trees and bushes by virtue of Pub. Sts. c. 52, § 10, as amended by St. 1885, c. 123, § 2, and upon the conditions therein pointed out. With the exception of St. 1885, c. 123, these statutes in the respects enumerated related to towns only, and had no effect upon cities. The cutting or removing of public shade trees in cities was still regulated by Pub. Sts. c. 54, § 10. This possible uncertainty in the effect of numerous statutes was perceived by "the commissioners for consolidating and arranging the Public Statutes," as appears by note to c. 53 of their report (on which the Revised Laws are based), and they attempted to remove it. With the exception of State highways, which it is not necessary to discuss (see R. L. c. 47, § 21; St. 1905, c. 279; St. 1908, c. 297; St. 1890, c. 196, and St. 1891, c. 49, which are not material upon this point) the provisions of

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law relating to the care of shade trees in towns were embodied in R. L. c. 53, §§ 12 to 15 both inclusive, and in c. 28, § 4, according to which park commissioners, wherever there were such officers, had control of shade trees in places under their jurisdiction; those touching the planting of shade trees, both in cities and towns, in c. 53, § 6; and those as to the cutting down or removal of such trees in cities in c. 53, §§ 7 and 8. Provisions common to cities and towns as to trees and bushes which obstruct and endanger public travel are in R. L. c. 51, § 10. This last section, however, makes important differences between the powers of city and town officers. Its portions material to this inquiry are: "The officer who has the care of trees belonging to a city or town . . . may, and if required by the surveyors or road commissioners shall, trim or lop off trees, except public shade trees in towns, and bushes standing in ways, and, if ordered by a vote of the mayor and aldermen, selectmen or road commissioners passed after public notice and hearing, shall cut down and remove such trees and bushes." By this statute it is mandatory upon the officer having charge of public shade trees in cities to trim or lop off all trees, whether shade trees or not, standing in ways, upon the request of the officer having charge of public ways. See *Chase* v. *Lowell*, 149 Mass. 85, at 91. No such provision is made as to towns, for in them the entire jurisdiction over public shade trees is vested in the tree warden, and as by R. L. c. 53, § 12, all shade trees within the limits of public ways are public shade trees, his jurisdiction extends over all shade trees in towns except such as by R. L. c. 28, § 4, is given to park commissioners. The discretion and sound judgment of the town tree warden alone determines whether a shade tree shall be trimmed or lopped, and he is not subject to the control of the surveyor or road commissioners. But in towns, the tree warden, or forester where there is one, is obliged to trim or lop trees other than shade trees, standing within public ways, upon demand of the surveyor or road commissioners. It follows as a necessary result of this provision that in cities not governed by some special charter or other statutory provision to the contrary (see for example St. 1866, c. 199, § 21; St. 1885, c. 163), it is the duty of the officer in charge of streets to ascertain the safety of limbs of trees, and to require dangerous branches to be re-

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moved immediately by the officer having charge of shade trees. The city official having charge of trees is bound at once and without hearing to act in accordance with such demand. It may be assumed that the Legislature made this provision in order that the trimming should be done, not by the road officer inexperienced in such matters, but by the scientific judgment of a forester or other official familiar with trees, and that thus the beauty and preservation of shade trees be conserved. At the same time it recognized that the safety of the travelling public is the paramount consideration, and placed upon the officer, charged with responsibility of maintaining all public ways reasonably safe and convenient for travel, the duty of determining whether any branches should be removed. The cutting down of shade trees can be done in cities, as well as in towns, only after an adjudication as provided in R. L. c. 51, § 10. As the present causes of action accrued in 1907, it is not pertinent to inquire what changes have been wrought by St. 1908, c. 296, and St. 1910, c. 363. The case was not tried in the Superior Court upon this interpretation of the statutes, but the defendant suffered no harm because the rules laid down were more favorable to it than those here stated.

If, however, it be assumed that the injury to the plaintiffs was due to a dangerous tree which could have been remedied only by its removal, and not by its trimming, the defendant has shown no error in the trial. There was testimony from several witnesses that the threatening condition of the tree had been plain for more than a year. On this showing, which the jury by their verdict under the instructions given must have found to be true, the officer charged with the care of the streets forthwith ought to have instituted proceedings before the appropriate public board to have the tree removed, and in the meantime by signs or otherwise to have warned the travelling public of the danger. It would have become the immediate duty of the public board to adjudicate that the tree should be removed. It must be assumed that such public board would act promptly and in accordance with the evidence. Seemingly no effort to this end had been made. On the contrary, the officer, whose duty it was to report any such danger to the proper city department, testified that he had never done so. No attempt to guard

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the place or inform the public of the peril appears to have been made. The defense rested as to evidence on the contention that there was no defect. This case does not raise any question as to what might be the law in the event of a claim for injuries received while the condition of the shade tree was the same as that which the public board had adjudged to be safe. But it is a case where there was evidence to support a finding that there had been for a long time a dangerous tree with no action whatever by the city officers respecting it. As pointed out by Mr. Justice Hammond in *Washburn* v. *Easton*, 172 Mass. 525, at 529, the questions whether the tree was dangerous by reason of decay and consequent liability to fall, and whether the municipality has used due care to protect the public from it while thus dangerous are ordinarily to be submitted to a jury. *Nestor* v. *Fall River*, 183 Mass. 265. This case called for the application of that rule. It was stated with sufficient amplification in the charge. The requests of the defendant for instructions to the jury were rightly refused except the second which was given in substance. The defendant suffered no injury by portions of the charge, to which exceptions were taken, for they were correct as applied to the theory on which the case was tried.

The foreman of the defendant's street department, after testifying that four trees were blown down during the storm in which the plaintiffs were injured, was asked, "Has there ever been a time when there was more than four trees blown down in the city in any one day?" This was excluded against the defendant's exception. No offer was made of what answer was expected, and the exception should be overruled on this ground. But assuming it would have been favorable to the defendant, the inquiry was properly excluded in the discretion of the trial judge as likely to lead aside into collateral matters and divert attention unduly from the main issue.

Exceptions overruled.

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ELLEN F. GREENE, administratrix, *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. November 10, 1910. — January 6, 1911.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Negligence, Employer's liability. *Evidence*, Presumptions and burden of proof, Opinion: experts. *Witness*, Examination.

In an action of tort against a corporation operating an elevated railway, by the administrator of the estate of a lineman in its employ, for the conscious suffering and death of the plaintiff's intestate, alleged to have been caused by a defect in a splice in a feed cable of the defendant with which a monkey wrench that the plaintiff's intestate was using came in contact and created a short circuit of electricity, there was evidence, elicited upon the cross-examination of one of the plaintiff's witnesses, which strongly tended to show that the cable containing the splice alleged to have been defective was so high above the nut on the end of the bolt of a dog clamp, which the plaintiff was grasping with the monkey wrench, that the wrench could not have come in contact with that cable and must have struck a lower cable, which was not shown to have been defective. It had to be admitted that the lower cable burned through and parted, while the spliced cable although burned did not drop, that the iron of the monkey wrench back of the jaws was in part melted, and that the top of the clamp was melted, facts which made it hard to believe that it was the spliced cable with which the wrench came in contact. But the physician, who attended the plaintiff's intestate, testified that the intestate told him that the monkey wrench hit the spliced cable, and that the matter with the cable which he hit with the monkey wrench was "that it was a new splice at that point," and there was no splice in the lower cable. *Held*, that in this conflict of testimony it was for the jury to decide what the fact was, and that the case properly was left to the jury.

In an action, by the administrator of the estate of a lineman against his employer, for the conscious suffering and death of the plaintiff's intestate alleged to have been caused by a defect in a splice of a feed cable of the defendant, which when it came in contact with the end of a monkey wrench that the intestate was using created a short circuit of electricity, there was evidence that the defective splice was wound about with tape and then painted, and a witness, called by the plaintiff as an expert, was allowed to be questioned and to answer as follows: Q. "Whether or not after the tape was put in, and before the tape was painted, whether or not an inspection of the joint would disclose the opening which you have indicated, if it was there? After the paint was on, will you tell me as to whether or not inspection would tell? A. No, it would all be smooth, slicked over by the paint. — Q. I want to ask you, on a metal joint what danger, if any, there would be in a workman having one end of that monkey wrench attached to a nut, and touching with the other end of the monkey wrench a joint which was taped properly — which was taped as you have described as the usual method of taping a joint, what danger there would be of short circuiting? A. I should say it would not short circuit under those circumstances. — Q. Whether or not, doing that under such conditions would be a safe thing for a workman to do? A. I

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should think it would be safe, yes." The defendant, in support of its exception to the admission of this evidence, contended that it related to matters of common knowledge which were not the proper subjects of expert testimony. *Held*, that none of these questions was objectionable as relating to matters of common knowledge, but that, if the answers contained matters of common knowledge, they did the defendant no harm because they were right, and that the jury were entitled to consider the facts stated in them whether such facts were matters of common knowledge or were imparted by the witness.

Certain questions, allowed by a presiding judge in the exercise of his discretion to be put to an expert, here were held not to violate the rules that the assumptions of fact upon which the opinion of an expert is asked and based should be reasonably clear, and that where certain facts are agreed and are obviously necessary as a premise to the formation of any instructive opinion upon the subject of inquiry, the question put to the expert should include such facts or at least should not be inconsistent with them.

If a presiding judge thinks that the jury will get more help upon a matter which is the subject of expert testimony, if an expert is allowed to give his opinion upon separate matters than they would if he were required to answer a hypothetical question reciting all the facts in the case, it is within the discretion of the judge to permit this to be done.

Where a presiding judge in the exercise of his discretion permits an expert witness to give his opinion upon separate matters instead of answering a hypothetical question reciting all the facts in the case, it is open to the opposing party to show on cross-examination of the expert that there are conceded facts in the case which have to be accounted for and which were not accounted for in the opinion given by the witness in answering the question put to him upon a single point in his direct examination.

An experienced lineman does not assume the risk of an injury from a short circuit of electricity occasioned by a defective splice negligently made by his employer in a feed cable, when there is nothing on the surface of the cable to indicate the defect.

In an action, by the administrator of the estate of an experienced lineman against his employer, for the conscious suffering and death of the plaintiff's intestate, alleged to have been caused by a defective splice in a feed cable of the defendant, which when hit by a monkey wrench that the intestate was using created a short circuit of electricity, where it appears that the splice was a new one and was covered by fresh paint, and an expert testifies that striking a properly made splice in a feed cable with a monkey wrench would not have any effect, the question of the intestate's due care is for the jury.

TORT, by the administratrix of the estate of Martin A. Greene, for the conscious suffering and death of her intestate by reason of injuries received on May 24, 1906, while he was in the employ of the defendant as a lineman, from a short circuit of electricity created when the end of a monkey wrench which the plaintiff's intestate was using came in contact with a large feed cable at a joint or splice, which was alleged to have been in a defective condition in regard to its insulation; the declaration containing five counts, of which only the first and the fourth are material, both

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alleging a defect in the ways, works or machinery of the defendant, the first count being for the conscious suffering of the intestate and the fourth count for causing his death. Writ dated September 21, 1906.

In the Superior Court the case was tried before *Brown*, J. The evidence material to the questions before this court is described in the opinion.

The defendant, having rested at the close of the plaintiff's case, asked the judge to direct a verdict for the defendant on each count of the declaration separately. The judge ordered such a verdict as to the second, third and fifth counts, but refused to do so as to the first and fourth counts, which he submitted to the jury, the counsel for the plaintiff stipulating that, if this court should decide that upon all the evidence, excluding such evidence, if any, as was wrongly admitted by the judge subject to the defendant's exception, he was wrong in sending the case to the jury on either the first or the fourth count, the verdict on that count should be set aside and judgment should be entered for the defendant thereon and judgment should be entered for the plaintiff for the amount of the verdict on the other count, if the judge was right in sending the case to the jury on such other count; and that, if the case should not have been sent to the jury on either count, judgment should be entered generally for the defendant.

Before the charge the defendant asked the judge to give the following instruction: "If the intestate, Martin Greene, was working for the defendant as a lineman at the time of the accident, and if the cause of his injury was a short circuit from a joint in a live cable through a monkey wrench or other piece of iron with or in connection with which he was working, then he assumed the risk of such an accident, and this action cannot be maintained."

The judge refused to give this instruction. It was agreed that, if he was wrong in refusing to give it, judgment was to be entered for the defendant on both of the counts submitted to the jury.

The judge, among other instructions, gave the following:

"Now, when this flash came, when this short circuit — whatever it was — came, what happened to Greene? Did he receive a charge of electricity that went through his body, or was he burned

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by the flash when the wrench, jaws of the wrench, and the dog came in contact?

"Now, there are a number of ways in which the accident might have happened. You have got to determine from the testimony what the way was. Of course if he was just coming from the water closet, as Powers said, just mounting the ladder, took up that wrench and engaged the jaws with the end of this bolt, and carelessly lost his grip, or his ladder slipped because it was carelessly placed, and in trying to recover himself he threw up his hand with the wrench in it, and grabbed the lower cable accidentally, brought that down on to the dog, and that is what caused the trouble, he cannot recover in this case. He can recover only if you find that in the careful use of that wrench it came in contact with the splice of the two-million cable."

The jury returned a verdict for the plaintiff on both of the counts submitted to them, on the first count in the sum of $3,000 and on the fourth count in the sum of $2,000. The judge reported the case for determination by this court, under the terms of the stipulations and agreements stated above.

The answers of the expert witness Forbes, to which the defendant excepted, and which are referred to in the opinion as they were numbered in the defendant's brief, and the questions in response to which they were given, were printed in that brief as follows:

"1. Q. With such a joint as that, made and taped in the way in which you have described, Mr. Forbes, what do you say as to whether or not striking it with a monkey wrench (such as I think you may have seen here), in going over or coming down and striking such a joint as you have described, taped as you have described, such a striking would cause the tape to cave in? A. No, it would not.

"2. Q. What effect would such a striking have upon that tape, taped as you have described? A. I shouldn't say it would have any effect.

"3. Q. Assume, if you will, Mr. Forbes, that a blow struck upon a tape wound around a joint similar to this joint did cause the joint at the place where the tape was wound to cave in. Can you tell us what happened? A. I should say, in my opinion, the — when the wrench went over and came against the joint,

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it struck a place where there was really nothing but paint, where, in the laying over the wires, laying the tape over the soldered joint, coming from a smaller section to an enlarged section, where the tape tends to rise up, that was laid diagonally, leaving a space; and when the tape came back, in a careless winding that space still remained.

"4. Q. I wonder if you can illustrate to us what you mean by that, using that piece of paper. A. Starting on the cable itself where the insulation has not been cut off (which would be represented by my wrist), and assuming my hand being larger, represents the increased size of the soldered joint, then if the tape is started back on the insulation and is carried forward, and is wound so as to exactly overlap, you get the effect; the tape being forced to follow what is really a conical surface, does not lay flat, it must be pulled or stretched. In order to make it lay flat, it would be necessary to wind a considerable distance. Of course that is the way a physician bandages a hand, on that principle. Now in winding that back and forth that way, and leaving cracks in the tape, between one layer of tape and the next, with one layer raised above the layer below it, then, in coming back again and going over that in that way, in my opinion a space was left (that would be represented by the space where my hand shows through this paper), which, when it was painted, was simply filled in with soft paint. The wrench coming against it, no resistance would be offered to prevent the metal coming against the copper.

"5. Q. Now I want to ask you, Mr. Forbes, as to whether or not after the tape was put in, and before the tape was painted, whether or not an inspection of the joint would disclose the opening which you have indicated, if it was there? After the paint was on, will you tell me as to whether or not inspection would tell? A. No, it would all be smooth, slicked over by the paint.

"6. Q. What do you say, Mr. Forbes, — is there any other way than the way in which you have described, by which a short circuit could be made by swinging over a monkey wrench, as has been described, and touching that joint? A. There is no other way, assuming the tape actually covered the wires. If there was one wire sticking out, so it wasn't covered, or anything

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of that sort, there might be; but assuming the wire was taped, then to get through the tape I should say there was no other way.

"7. Q. I want to ask you, on a metal joint what danger, if any, there would be in a workman having one end of that monkey wrench attached to a nut, and touching with the other end of the monkey wrench a joint which was taped properly — which was taped as you have described as the usual method of taping a joint, what danger there would be of short circuiting? A. I should say it would not short circuit under those circumstances.

"8. Q. Whether or not, doing that under such conditions would be a safe thing for a workman to do? A. I should think it would be safe, yes."

W. Flaherty, for the plaintiff.

W. G. Thompson, (*G. E. Kimball* with him), for the defendant.

LORING, J. 1. To find for the plaintiff under the charge of the presiding judge the jury had to find that the two million cable hung within the circle described by the end of the monkey wrench as it revolved with its jaws engaged on the end of the bolt of the dog clamp.

The defendant's first contention is that the evidence did not warrant a finding to that effect.

The intestate and one Powers were engaged in boring a hole through a T iron which ran between two girders at the bottom of one of the underneath trusses of the defendant's elevated structure. The work of the defendant, of which the boring of the hole was a part, consisted in changing over four feed cables. These had been strung on brackets extending out horizontally over the street from the side of the elevated structure. They were to be strung on wooden stanchions extending from the bottom to the top of one of the underneath trusses of the elevated structure so that they would hang in a vertical plane within the sides of the truss. At the time here in question the four feed cables were temporarily hung by ropes substantially in their new position and one stanchion at least had been bolted on to the structure. The hole in question was being bored in one of the lower cross irons of the truss between the two bottom girders of

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it. This was a T iron, the cross piece of the T being at the bottom of the iron as it was affixed to the girders. The plaintiff's intestate was standing on an ordinary ladder with his chest about opposite to the hole which he was boring. He had his right hand on a "dog clamp." This "dog clamp" was a heavy iron clamp, shaped somewhat like a horseshoe, with a bolt through the opening. There was a thread cut around the outside of the bolt, with a nut on the end of it. This clamp was over the top of the cross iron and was holding in position next to it what is called in the bill of exceptions an "old man." An "old man" consists of flat pieces of iron with two shorter pieces at each end of the main piece at right angles to it and running in opposite directions. The purpose of the "old man" was to afford a bearing for a ratchet used in boring the hole through the cross iron. At the time in question the position of the ratchet had to be changed and the intestate was holding with his right hand the clamp (which held the cross piece of the "old man" next to the cross iron) and was about to loosen the bolt of the clamp with a monkey wrench when the accident happened. Powers (who was working with the intestate and was working the ratchet) was sitting on a piece of wood running from girder to girder, parallel to the cross iron here in question and separated from it by the "old man." Powers testified that the intestate had been to the water closet, that he had returned, had ascended the ladder and had grasped the clamp with his right hand; that he (Powers) saw him reach for his monkey wrench which was hanging from a round of the ladder by a wire hook. That he (Powers) then turned one side to spit out some tobacco juice when there was a flash which burned his face; that he fell to the ground and that the intestate also slid down the ladder to the ground, feet foremost. The monkey wrench was made of iron from end to end, with wooden faces clamped on the sides at the upper end to make a handle. The plaintiff's theory was that, as her intestate turned the monkey wrench to loosen the bolt of the clamp, it came in contact with a defective splice in a two million cable which hung above it. The two million cable was the next one to the lowest of the four cables as they hung at that time over the bolt. The defendant's contention is that on the evidence this cable was outside the

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circle described by the end of the wrench as it revolved with jaws engaged on the end of the bolt. The intestate was badly burned about the face, chest, arms and hands, and died of these wounds seven days after the accident. Before his death he told his doctor how the accident happened. His doctor testified that he said that "he was either tightening or loosening a rivet on a machine he called the 'old man' . . . and that the monkey wrench that he was using, in coming around, struck the cable and it dented, there was a flash and he slid down the ladder . . . to the ground." He said "that it was a new splice at that point"; "that it looked all right." The witness added that it was his "impression" that the intestate said that when his monkey wrench struck the cable "it caved in." It appeared that the elevated structure at the point here in question is on a curve, and that the brackets on which the feed cables previously had been strung were on the inside of this curve. For that reason the cables had to be lengthened. The splice mentioned above had been made in the two million cable within a few days, to lengthen that cable for this reason. There was testimony from an expert that there were marks on the monkey wrench which indicated that the electricity which made the short circuit might have entered from the upper end of the wrench.

What the defendant relies on (in its contention that the evidence did not warrant a finding that the two million spliced cable was within the circle of the monkey wrench with its jaws engaged on the end of the bolt) is the testimony elicited by it on the cross-examination of Powers. Powers testified that the cables were above the cross iron and not in contact with it. He said that he did not know how far they were above the top of the cross iron, but on being pressed he reluctantly gave as an estimate that the one million cable (the lowest of the four) was six inches above the top of the iron, that the two million cable was six inches above that and that the nut on the end of the bolt of the clamp was three to four inches below the top of the iron. This estimate made the two million cable fifteen to sixteen inches above the nut. The length of the wrench from the inner face of the lower jaw to the upper end of it was eleven inches.

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The short answer to this contention of the defendant is that if the jury believed that the doctor was accurate in his testimony of what the intestate said and that the intestate told the truth, Powers's estimate of these distances was wrong. For although the intestate spoke of one cable only the cable he spoke of was the spliced cable, and there was no splice in the one million cable. He said that the monkey wrench hit the spliced cable. In addition there was evidence from an expert that if the tape with which a splice is wrapped had been carelessly wound about the splice a hole might be left which would be covered from view by the paint with which the whole is coated and so, if a wrench were to come up against such a weak spot in the taping, the splice would "cave in."

It had to be admitted that the lower cable burned through and parted while the spliced cable did not, that the iron of the monkey wrench back of the jaws was in part melted, and that the top of the clamp was melted. With these facts in the case it was hard to believe that Powers's estimate of the distances was wrong and that the intestate made a short circuit in the spliced cable in the way he was made by the doctor to say that he did and that he could and did strike it with the wrench while its jaws were engaged on the bolt of the clamp. But he said that he did, or what he said could be found by the jury to have meant that. In this conflict of evidence it was for the jury to decide what the fact was.

2. The defendant next contends that a material part of the testimony of the expert was admitted under its exception and was "wrongly admitted." It appears from the report that the case was sent to the jury on the first and fourth counts "on the stipulation of counsel for the plaintiff that if the Supreme [Judicial] Court should decide that upon all the evidence, excluding such evidence, if any, as was wrongly admitted by me over the defendant's objection and exception, I was wrong in sending the case to the jury," judgment should be entered for the defendant.

The first contention of the defendant in this connection is that the presiding judge allowed the expert to testify on matters of common knowledge and that such evidence was "wrongly admitted" within the meaning of the above stipulation and therefore

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must be excluded. The defendant complains of the answers to certain questions specified in his brief numbered 5, 7 and 8. We are of opinion that none of these questions is open to this objection, and if they were the expert answered them rightly. The jury were entitled to consider the facts whether they were testified to by the expert or were matters of common knowledge. It follows that the judge was not "wrong in sending the case to the jury" so far as these facts are concerned.

The defendant has put great reliance upon the case of *Gilbert* v. *Guild*, 144 Mass. 601. In that case a question to an expert was excluded by the presiding judge on the ground that it was a matter of inference to be decided by the jury on the facts in evidence and the opinion of the expert. That does not help this defendant in this contention.

The defendant's second contention in this connection is that the assumptions of fact upon which the opinion of an expert is asked and based should be reasonably clear, and that where certain facts are agreed and are also obviously necessary as a premise to the formation of any instructive opinion upon the expert question presented, the question put to the expert should include such agreed fact or facts, or, at least, should not be inconsistent with them. The defendant complains that this rule was not observed in the answers to questions numbered in its brief 1, 2, 3, 6, 7 and 8. We are of opinion that the presiding judge in his discretion had a right to allow the plaintiff to ask the expert as to the possibility of a short circuit being made "by swinging over a monkey wrench, as has been described," meaning as had been described in Greene's statement testified to by the doctor, and that the same is true of questions 1, 2, 3, 7 and 8, and that in doing so he did not violate the rule stated above.

The defendant in this connection also contends that in questions 3, 6, 7 and 8 the expert was allowed to give his opinion on a hypothetical case without taking into consideration facts which it was conceded existed in the case at bar. The question numbered 3 may be taken as an example. By allowing that question to be put and answered the presiding judge allowed the expert to testify to the significance of the fact (if the jury should find it to be the fact) that the splice "caved in" when "a blow

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[was] struck upon a tape wound round a joint [splice] similar to this." If a presiding judge thinks that the jury will get more help upon a matter which is the subject for expert testimony, by allowing the expert to give his opinion upon separate matters than by answering a hypothetical question involving all the facts in the case, it is within his discretion to do so. See in this connection *Phillips* v. *Lockey Piano Case Co.* 205 Mass. 59. If the party producing the expert is allowed to proceed in that way in the examination of his expert witness, it is open to the other party to show on the cross-examination of the expert that there are conceded facts in the case which have to be accounted for and which were not accounted for in the opinion expressed by him on the single point on which he had given an opinion in his direct examination.

3. The next contention of the defendant is on the merits of the case. It was conceded that as a result of the short circuit here in question the one million cable burned apart and the two million cable although burned did not drop. It was also conceded that the intestate, being an experienced lineman, assumed the risk of the insulation of the one million cable having become worn out, and therefore if the short circuit was made by the monkey wrench striking the one million cable at a point where the insulation was made no case was made out. See *Chisholm* v. *New England Telephone & Telegraph Co.* 176 Mass. 125. The defendant's contention is that on the evidence it is at the best a matter of conjecture which cable was touched by the monkey wrench, and so no case was made out by the plaintiff within cases like *Jameson* v. *Boston Elevated Railway*, 193 Mass. 560; *Horne* v. *Boston Elevated Railway*, 206 Mass. 231. The answer to that is that the intestate said that "the matter with the cable" which he hit with the monkey wrench was "that it was a new splice at that point."

4. The defendant has also contended that an experienced lineman assumes the risk of danger coming from a splice negligently made by the defendant in one of its cables (part of its ways, works or machinery), when there is nothing on the surface of the cable to indicate that fact. We are of opinion that he does not, and for that reason the presiding judge was right in refusing to give the ruling asked for by the defendant.

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5. The expert testified that striking a properly made splice in a feed cable with a monkey wrench would not have any effect. The intestate said that the splice was a new one and it seems to have been conceded that this was apparent from the fresh paint which was upon it. In the face of this testimony and this fact the question of the intestate's due care was for the jury.

The entry must be

Judgment on the verdicts.

MARY J. HILLMAN *vs.* BOSTON ELEVATED RAILWAY COMPANY.

JOHN J. HILLMAN *vs.* SAME.

Middlesex. November 11, 1910. — January 6, 1911.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Negligence, Invitation, Licensee. *Elevated Railway.*

A corporation, which operates an elevated railway and maintains an elevated terminal and transfer station, in the centre of which is a single track for its elevated trains constructed in a pit four feet below the surface of the station platform, and which also maintains a subway, crossing under this pit, by which passengers may pass from one side of the station to the other in order to take surface cars which are run from the ground to the level of the station platform on inclined tracks leading to the outward sides of the platform, does not invite passengers to cross from one side of the station platform to the other by using as bridges the platforms of the cars of an elevated train, which is standing in the pit with its gates open for the purpose of admitting passengers, merely because it does not forbid persons from crossing in this way when its servants see them doing it and tolerates such a practice without taking any active steps to prevent it.

TWO ACTIONS OF TORT, the first by a married woman for personal injuries received by her on June 24, 1902, at a terminal station of the defendant at Sullivan Square in that part of Boston called Charlestown, alleged to have been caused by negligence of the defendant's servants in closing a gate attached to one of the cars on the elevated railway of the defendant upon the skirt of the plaintiff's dress, so that she could not release herself and was dragged along the platform of the station when the train started, and the second action by the husband of the plaintiff in the first case for loss of her society and for expenses

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incurred in consequence of her injuries. Writs dated May 14, 1903.

In the Superior Court the cases were tried together before *Hitchcock*, J. The plaintiff in the first case was injured in passing from the platform on one side of the station to that on the other side by crossing the platform of a car of an elevated train of the defendant, which was standing between the two platforms for the purpose of discharging and receiving passengers, as described in the opinion.

At the close of the evidence the plaintiffs asked the judge for eleven instructions to the jury. The judge refused to give any of these instructions, and, among other instructions, gave the following:

"Now, with reference to the station at Sullivan Square; if West Somerville cars come in on one side of the elevated track, — which the evidence indicates was considerably depressed below the level of the platform, — and the Malden cars on the other side, and it is necessary, in order to go from West Somerville cars to the Malden cars, to take advantage of the transfer which the company gives, — if it becomes necessary to cross the tracks of the elevated railroad, it will be the duty of the defendant to provide a safe, suitable, and convenient way for getting across those tracks. Now, there is one of the issues in this case. The evidence seems to show that they did provide a way by which persons could go across. There does not seem to be or appear to be any dispute about the fact that what has been spoken of as a 'subway' was provided, and which was reached by steps on one side and steps on the other, and also that there was a system of transfer checks, and there were certain signs up. If the defendant company provides a safe and convenient way of getting across the tracks, — provides a system by which passengers can be transferred with safety to themselves, the defendant company has done all that is required of it to do so far as its duty is concerned towards the safety and convenience of its passengers; and if the plaintiff, knowing that such a way has been provided, — having full knowledge of it, — sees fit not to avail herself of that way that is provided, but did adopt some other way, which may be dangerous, the plaintiff would be considered as having taken her chances in adopting that dangerous

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way. I say, if the plaintiff knew that a way had been provided, and that the regular way that was provided would be to go down through this subway, and, instead of doing that, she saw fit to takes chances in getting across by some other way, the plaintiff has no cause to complain if an accident happens in consequence thereof.

"But the plaintiff comes in at this point and says that not only does she know, — and I understand her to testify that she did know that there was that way of getting across, — not only did she know that fact, but also that it was a common practice for people to go across the platform, and, sometimes, through the cars of an elevated train which might be standing in the station, and that was done so frequently and so generally that it must be considered as amounting to an invitation on the part of the defendant company to go across those cars, — to use those cars as a bridge, for instance, — that expression has been used frequently, — that it was an invitation on the part of the defendant to use those cars for a bridge to cross the tracks. Now, I cannot tell you that that amounts to an invitation. In fact, I must say to you that it does not amount to an invitation from any evidence that has appeared in this case. But it may be, that, knowing that people used it, it may well be supposed, and may well be argued as it has been, that the evidence might be such that you might find from that that there was an implied consent on the part of the defendant company; that is, they, knowing that these cars were used in that way, making no effort to stop it, making no protest by way of signs or anything of that nature, — that you may well find that there was a license to people to go across there. That is the position in which, it seems to the court, this plaintiff must stand; that is, in attempting to use the front platform of the car as a bridge to go across from one platform to the other, knowing that there was a way provided for crossing, knowing that there was a system of transfers, and using this for her own convenience, as she testified, she must be considered at the most at that time as being a mere licensee. . . . But when a person goes across like that, — as a licensee, — another rule of law arises, and that is that the defendant would owe a licensee no duty except to refrain from wilfully or recklessly or wantonly injuring the person. . . .

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"In this connection, I adopt and give to you as a part of the instructions, a request that is made by the defendant, as follows: If the plaintiff Mary J. Hillman used the train as a bridge for her own convenience to cross from one platform to the other, and without intending to take a passage on the train, she cannot recover unless the servants or agents of the defendant wilfully or wantonly injured her."

The plaintiffs excepted to that part of the charge in which the judge stated that the plaintiff Mrs. Hillman was a licensee, and that the only duty which the defendant owed her was to refrain from wilfully or wantonly injuring her. The cases then were submitted to the jury, who returned a verdict for the defendant; and the plaintiffs alleged exceptions.

W. W. Stover, for the plaintiffs.

W. Shuebruk, for the defendant.

LORING, J. The only question in this case is whether the evidence warranted the jury in finding that the plaintiff in the first action was invited by the defendant to go from one to the other platform in its Sullivan Square station by crossing over an elevated train which was standing between the two platforms to discharge and receive passengers.

Sullivan Square station is primarily a transfer station. Through the centre of it runs the single track of the defendant's elevated railway. This track runs north and south and is in a pit about four feet below the station platforms. The station platforms are on a level with the platforms of the cars of the elevated trains. Surface cars from and to Somerville and beyond run up an incline on to five tracks with dead ends which are reached from the platform on the west of the pit through which the elevated trains run. Similarly surface cars from and to Everett and Malden run up an incline on to five tracks on the east side of the pit. Passengers who have taken a surface car at Somerville for a point reached by a surface car running to Everett or Malden have to pass from the west to the east platform which (as we have said) are separated by this pit four feet deep, extending the whole length of the platforms. A subway had been constructed by the defendant for this purpose at the south end of the station, which led down under the pit and up to the platform on the other side. There was a turnstile and ticket office

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at each entrance to the subway, and a ticket was given to each passenger on his entering it. There was a sign on the west platform (the platform on which the plaintiffs disembarked) near the entrance to the subway, on which was printed in large letters, "Subway to East Platform," with an "index hand" pointing to it; and on the ticket office at the entrance another sign, in smaller letters, on which was printed "Transfer to Surface Cars and East Platform."

On the morning in question the plaintiff in the first action and her husband (the plaintiff in the second action) left their home in West Somerville to visit their son who lived in Malden. The plaintiff was a woman sixty-eight years of age and her husband (as she testified) was aged, feeble and just recovering from a paralytic shock. When the plaintiff and her husband disembarked at the Sullivan Square station there was an elevated train standing between the two platforms, with the gates on its car platforms open. The plaintiff assisted and guided her husband on to the platform of one of the cars of this train and was about to follow him when another woman crowded in between them. The husband reached the east platform in safety, but as the plaintiff was stepping from the car platform to the east platform of the station the starting gong sounded and the brakeman closed the gate. The plaintiff at once felt that her dress was caught, turned round and tried to free it by pushing on the gate. A guard on the station platform called "Open the gate," but before the brakeman who was then looking into the car did so the plaintiff was thrown down and dragged some distance along the platform of the station. The plaintiff testified that she knew the subway was there for the purpose of enabling passengers to go from one platform to the other, but that she did not want to take her husband up and down the two flights of steps; "that she feared the exertion would be bad for him," and took the way across the elevated train "for her own convenience."

The plaintiff contends that there was evidence in the case which warranted the jury in finding that the defendant had invited her to use the elevated train as she did use it. The evidence on which this contention is based consists of the plaintiff's testimony that "she had frequently seen other people use trains as a bridge in crossing from one platform to the other," and

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"she had never seen any signs or notices displayed in the terminal forbidding such crossing by means of the trains, and she had never seen any attempts made by the guards or trainmen to prevent it." There was testimony from two other witnesses that "it was a general practice for passengers going from one platform to the other to walk across the platform of the elevated cars standing in the station or through the cars," meaning through the doors in the middle of the sides of the cars. That "there were no notices posted by the defendant forbidding people to cross from one platform to the other by means of the trains standing there, and he had never seen any employee of the defendant forbidding any person to use the trains for this purpose or attempting to prevent any one from so using them." The defendant's station master testified that "he had seen people use the elevated trains to cross the tracks; that they had done so every day." Several of the defendant's employees testified "that they had been instructed not to allow people to cross by the trains, and when people asked them how to cross to the further platform they always directed them to use the subway; that passengers used the trains as a means to cross; and that witnesses did not and could not attempt to stop them, because when a person stepped on to the platform of an elevated car it was impossible to tell whether they intended to cross to the other platform or to go inside the car to ride."

It was said by Chief Justice Bigelow in *Sweeny* v. *Old Colony & Newport Railroad*, 10 Allen, 368, 374, that "a mere passive acquiescence by an owner or occupier in a certain use of his land by others involves no liability." In *Wheelwright* v. *Boston & Albany Railroad*, 135 Mass. 225, 229, it was said by Colburn, J.: "The most that can be contended, on the evidence, is, that the defendant had tolerated a practice, which the plaintiff and others had adopted, of crossing where she was attempting to cross, without taking any active measures to prevent it. This is far different from an inducement or invitation from the defendant to cross there." And in *Galligan* v. *Metacomet Manuf. Co.* 143 Mass. 527, 528, this rule of law was stated by C. Allen, J., in these words: "Merely abstaining from driving the children off is not an invitation which would impose any duty or responsibility for the condition of the lot." A number of cases have been since

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decided on the rule of law thus clearly stated. See *Redigan* v. *Boston & Maine Railroad*, 155 Mass. 44; *Shea* v. *Gurney*, 163 Mass. 184; *Moffatt* v. *Kenny*, 174 Mass. 311; *Legge* v. *New York, New Haven, & Hartford Railroad*, 197 Mass. 88; *Bowler* v. *Pacific Mills*, 200 Mass. 364; *Boden* v. *Boston Elevated Railway*, 205 Mass. 504.

The case at bar comes within this well established principle. In addition there is in this case a point which was relied upon in the decision of the recent case of *Bowler* v. *Pacific Mills*, *ubi supra*, at p. 365, namely, that it would have been impracticable if not impossible to prevent persons from using the defendant's premises as they were used by the plaintiff without interfering with the defendant's business in the use of its premises in question. The cases of *Sweeny* v. *Old Colony & Newport Railroad*, 10 Allen, 368, and *Murphy* v. *Boston & Albany Railroad*, 133 Mass. 121, relied on by the plaintiff, were cases depending upon special circumstances which have been fully explained in previous cases. See *Bowler* v. *Pacific Mills*, 200 Mass. 364, 366, where the distinction is pointed out and these previous cases are collected.

Exceptions overruled.

JOHN TREPANNIER *vs.* FLAVIEN COTE.

Bristol. November 14, 1910.— January 6, 1911.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Negligence, Employer's liability, Independent contractor.

In an action, against a person alleged to have been the plaintiff's employer, for personal injuries caused by the collapse of a barn in process of construction, which had been erected negligently by one P., the defendant contended that P. was an independent contractor, and the plaintiff contended that P. was the defendant's superintendent. P. died before the trial. A witness testified that P. told him that he was "running the job," and that he was foreman. The plaintiff testified that he went to work on a certain day, that on the previous day he asked the defendant "for a job" on the barn and that the defendant said, "Go and see P.," to which the plaintiff answered, "I went to see him and he told me to come and see you, he wasn't hiring the men," and that the defendant then said "Go and see him and tell him it is I told you to

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come there," that the plaintiff went to P. and was hired on that day and went to work on the morning of the next day. P.'s son testified that "the job started" on the day on which the plaintiff testified that P. hired him, and the defendant testified that the contract with P. was made on the morning of the next day, on which the plaintiff testified that he went to work. So far as appeared, the only agreement of hiring which the plaintiff made was that to which he testified as above. There was evidence that after the accident by which the plaintiff was injured the defendant took the plaintiff home in his buggy, or hired his brother to do so and paid him for it. *Held*, that there was evidence that the plaintiff's injuries were caused by the negligence of a superintendent of the defendant, which warranted a verdict for the plaintiff.

TORT, by a carpenter against his alleged employer, for personal injuries sustained on October 24, 1908, caused by the collapse of a barn in process of construction on Eastern Avenue in Fall River, in which the plaintiff was at work. Writ dated December 16, 1908.

In the Superior Court the case was tried before *Fox*, J. The defense relied upon was that one Perrault, who was in charge of the construction of the barn, was an independent contractor. The evidence upon this question is stated in the opinion.

At the close of the evidence the defendant asked the judge to rule that upon the pleadings and the evidence the plaintiff was not entitled to recover. The judge refused to make this ruling. The plaintiff waived all except the third count of his declaration, which alleged negligence of a superintendent, and the judge submitted the case to the jury on that count.

The jury returned a verdict for the plaintiff in the sum of $175; and the defendant alleged exceptions.

The case was submitted on briefs.

H. A. Dubuque, for the defendant.

A. G. Weeks, for the plaintiff.

LORING, J. The plaintiff in this case was injured by the collapse of a barn while in process of construction. One Perrault was in charge of the work. The evidence warranted a finding that the collapse of the barn was caused by the negligent method of erection pursued by Perrault. The defendant contended that Perrault was doing the work as an independent contractor, and the only question here is whether there was evidence that the plaintiff was hired by the defendant and not by Perrault as an independent contractor.

If Perrault was not an independent contractor he was or could

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have been found to be a superintendent of the defendant. We are of opinion that there was evidence of that fact. Perrault was dead at the time of the trial. One witness testified that "Perrault always told me that he was running the job; he was foreman." In addition the plaintiff testified that he went to work on October 20; that on October 19 he asked the defendant "for a job" on the barn and the defendant said "Go and see Perrault." To which the plaintiff answered: "I went to see him and he told me to come and see you, he wasn't hiring the men," and the defendant replied, "Go and see him and tell him it is I told you to come there." That he then went to Perrault and was hired on that day and went to work on the morning of the next day, the twentieth. Perrault's son testified that "the job started on the nineteenth of October," and the defendant's story was that the contract with Perrault was made on the morning of the twentieth. Not only was the plaintiff hired the day before the contract was made and seemingly at an earlier hour on that day, but so far as appears this was the only agreement of hiring which the plaintiff made. There was also evidence that the defendant took the plaintiff home in his buggy after the accident, or hired and paid his brother, a livery stable keeper, for doing so. This could be taken to be an admission that he was the person interested.

Exceptions overruled.

TIMOTHY J. DOW *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. November 14, 1910. — January 6, 1911.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Negligence, Employer's liability. *Elevated Railway. Street Railway. Words*, "Elevated train."

The motorman of a surface car, operated by a corporation which also operates an elevated railway, is not a person in charge or control of an "elevated train" within the meaning of R. L. c. 106, § 71, as amended by St. 1908, c. 420, when he is running the car up an incline to discharge passengers to be transferred to trains running on the corporation's elevated railway and to receive passengers transferred to the car from trains running on such elevated railway, and, if the conductor of another like surface car, operated by the same corporation, is in-

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jured through the negligence of such a motorman while thus running the car up the incline, his only remedy is against the motorman.

Whether the provision of St. 1908, c. 420, amending R. L. c. 106, § 71, that "an elevated car which is in use by or which is in possession of an elevated railway corporation, shall be considered as a part of the ways, works or machinery of the corporation which uses or has it in possession," includes a surface car operated by a corporation, called an elevated railway company, which operates both elevated railways and surface lines, while such car is being used to connect with trains running upon the elevated structure, here was referred to as a question which did not arise in the present case.

LORING, J. The plaintiff was the conductor of a surface car operated by the defendant running from a point in Somerville to the Sullivan Square station of the defendant in Charlestown, where it delivered passengers to and received them from the trains of the defendant running on the tracks of the elevated railway.* This surface car ran up on an incline to a dead end in the station separate and some fifteen feet distant from the track of the defendant's elevated railway. On the day in question the surface car of which the plaintiff was the conductor had reached the end of its run in the Sullivan Square station and the plaintiff was in the act of pulling out and fastening the fender for the return trip when he was run into by the negligence of the motorman of another surface car, who ran in for the same purpose on the same track behind the plaintiff's car. The judge † ruled that R. L. c. 106, § 71, as amended by St. 1908, c. 420, applied to such a car, found that the motorman was negligent, that the plaintiff's damages amounted to $500, and reported the case to this court.

Unless this surface car was an "elevated train" within St. 1908, c. 420, the plaintiff's sole remedy is against the motorman whose negligence caused the injury to him. *Fallon* v. *West End Street Railway*, 171 Mass. 249. *McGilvery* v. *Boston Elevated Railway*, 200 Mass. 551.

The judge found that the car was not defective. For that reason the question whether the provision of St. 1908, c. 420

* It appeared from the evidence stated in the opinion in *Hillman* v. *Boston Elevated Railway*, *ante*, 478, that the Sullivan Square station also was used for the transfer of passengers from surface lines ending at and starting from that station.

† *Hardy*, J., sitting without a jury. The accident occurred on December 7, 1908, and the writ was dated February 4, 1909.

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(that "an elevated car which is in use by or which is in possession of an elevated railway corporation, shall be considered as a part of the ways, works or machinery"), applies to this surface car, does not arise.

In our opinion a surface car does not become an "elevated train" by being run up an incline to discharge and receive passengers transferred to it from trains running on the defendant's elevated railway. In accordance with the terms of the report, judgment must be entered for the defendant.

So ordered.

C. S. French, for the defendant.

J. S. Richardson, for the plaintiff.

AMERICAN SODA FOUNTAIN COMPANY *vs.* SPRING WATER CARBONATING COMPANY.

Suffolk. November 15, 1910. — January 6, 1911.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Sale. False Representations.

Where one has submitted to a prospective purchaser a drawing of a certain appliance which he offered to make for the purchaser and in good faith has made representations to the purchaser as to what in his opinion an appliance made in accordance with the drawing ought to do, and the purchaser, relying on the representations, orders the appliance to be made according to the drawing and purchases it, the seller can recover the purchase price although the appliance fails to do what the seller gave as his opinion that it ought to do.

In an action upon items of an account annexed based on an order in writing by the defendant upon the plaintiff for draught arms, to be made according to a "drawing submitted," for the extracting of root beer from kegs, the defendant offered evidence tending to show "that during preliminary negotiations and at the time the order was signed the plaintiff represented to the defendant that it would manufacture special draught arms to be used for the purpose of drawing root beer from wooden kegs, which would deliver automatically two streams of different volume and at different degrees of velocity and which would be durable and practical for the purpose for which they were designed, and submitted to the defendant a drawing or plan of a draught arm, claimed by the plaintiff to be durable and practical for the purpose aforesaid and represented that it would manufacture for the defendant special draught arms in accordance with said plan, which would accomplish the purposes aforesaid; that the defendant, relying upon said representations and believing them to be

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true, ordered the plaintiff to manufacture for" him the draught arms described in the account annexed, but that the draught arms delivered "were found not to be durable and practical for the use for which they were intended and would not deliver automatically two streams of different volume and at different degrees of velocity." The defendant contended that, while the representations were not "fraudulent in fact" they amounted "in law to fraudulent representations" and were a defense to the action. There was undisputed evidence, which the defendant did not offer to contradict, that the representations made by the plaintiff were not as to his knowledge of what draught arms like those shown in the "drawing submitted" would do, but of what in his opinion they would do. *Held*, that the evidence offered fell short of tending to show that the plaintiff had made any representations which could be shown in defense of the action, such representations as were made being of matters of opinion and not of knowledge.

LORING, J. This is an action upon an account annexed, only three items of which were disputed, they being items based on a written order for one hundred special draught arms to be manufactured "as per drawing submitted." At the trial it was admitted that one hundred special draught arms manufactured according to the "drawing submitted" had been delivered to the defendant, and that $272 of the purchase price had been paid by it on account. But the defendant contended that the contract was procured by fraud and that it had been avoided on that ground. It set this up in defense to the action for the unpaid balance of the purchase price and filed a declaration in set-off to recover back the $272 paid by it to the plaintiff on account.

In support of its contention the defendant offered to prove: "That during preliminary negotiations and at the time this order or contract was signed the plaintiff represented to the defendant that it would manufacture special draught arms to be used for the purpose of drawing root beer from wooden kegs, which would deliver automatically two streams of different volume and at different degrees of velocity and which would be durable and practical for the purpose for which they were designed, and submitted to the defendant a drawing or plan of a draught arm, claimed by the plaintiff to be durable and practical for the purpose aforesaid and represented that it would manufacture for the defendant special draught arms in accordance with said plan, which would accomplish the purposes aforesaid; that the defendant, relying upon said representations and believing them to be true, ordered the plaintiff to manufacture for it one hundred of said special draught arms, made according to said

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drawing or plan." The judge* ruled "that the offer of proof, if maintained, did not constitute a defense to the action and did not entitle the defendant to recover on its declaration in set-off." The case is here on an exception to that ruling.

It is stated by the defendant in its bill of exceptions that it was induced to give the order sued on "by certain false representations, not fraudulent in fact, but amounting in law to fraudulent representations"; and its sole contention is that the representations of the plaintiff which it offered to prove were representations of fact made by the plaintiff as of its own knowledge and so of themselves fraudulent without proof of a *scienter* within the rule applied in *Chatham Furnace Co.* v. *Moffatt*, 147 Mass. 403, where the earlier cases are collected. For a latter case see *Adams* v. *Collins*, 196 Mass. 422.

To make out a fraud of that kind the defendant had to prove that the plaintiff had in fact tested the special draught arms made according to the "drawing submitted," or represented that that had been done, and that the result of the test was that they would do what the defendant wished them to do. Or the defendant had to prove something equivalent to that. What he offered to prove manifestly was short of that if it had stood by itself. But it did not stand by itself in the case at bar. Witnesses called by the plaintiff had testified "that the defendant desired to procure a faucet through which both still and live beer could be drawn; that the draughtsman of the plaintiff made a working drawing of a draught arm designed to draw both still and live beer, and submitted it to Mr. Flynn. It appeared that Flynn, the defendant's manager, examined this sketch and signed and delivered to the plaintiff" the order sued on, and there was no offer to contradict this. On this bill of exceptions it must be taken that the plaintiff caused its draughtsman to design the arm shown in the "drawing submitted" for the purpose of accomplishing what the defendant wished, and that the representations which the defendant offered to prove were not representations by the plaintiff as of its own knowledge as to what these special draught arms had done, but a representation of its opinion as to what they ought to do. Such misrepresentations "not fraudulent in fact" are not

* *Bell, J.*

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ground for rescinding a contract. No cases in this Commonwealth have gone further than *McCusker* v. *Geiger*, 195 Mass. 46; *Goodwin* v. *Massachusetts Loan & Trust Co.* 152 Mass. 189.

Exceptions overruled.

C. A. Warren, for the defendant.

P. Ketchum, for the plaintiff.

DALTON FALLON *vs.* CLIFTON MANUFACTURING COMPANY.

Suffolk. November 16, 1910. — January 6, 1911.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Corporation, Officers and agents. *Agency*, Ratification. *Contract*, What constitutes, Implied. *Practice*, *Civil*, Exceptions, Amendment of verdict.

At the trial of an action against a corporation for alleged arrears of salary there was evidence tending to show that the treasurer of the corporation agreed to pay the plaintiff $50 per week for a year for services to the corporation, that the plaintiff performed the services for about six months, during the first three of which the treasurer was absent, and during five months received pay at the rate of $50 per week with the knowledge and consent of the defendant's officers, and the secretary of the corporation testified that thereafter, a dispute arising, at a meeting of the directors of the defendant "it was allowed" that the plaintiff was owed the amount that he claimed, "but we wanted to try and make the best settlement we could." *Held*, that a verdict for the plaintiff was warranted.

Where the declaration in an action of contract contains two counts alleged to be for the same cause of action, one upon a special agreement for a certain fixed amount, and the other upon a *quantum meruit*, an exception by the defendant to a refusal by the presiding judge to rule that on all the evidence the jury should find for the defendant on the special count will not be sustained, even although there were no evidence to support a verdict for the plaintiff on that count, if the jury return a general verdict in an amount less than the fixed sum claimed in that count, since it is apparent that the jury did not find for the plaintiff on the special count and that the defendant was not harmed by the refusal to rule.

At the trial of an action against a corporation upon a *quantum meruit* for bringing about the sale of some of the capital stock of the defendant, there was evidence that the treasurer of the defendant employed a broker to obtain a purchaser of capital stock, to whom a purchaser applied, that the broker requested some one connected with the defendant to take the matter up with the purchaser and that the treasurer asked the plaintiff to do so, stating to the plaintiff that he would be "well paid for it." The plaintiff did as requested, the sale was made, and the broker was paid a commission. There also was evidence that, a controversy arising as to whether the plaintiff should be paid anything, the matter was brought before the defendant's board of directors who left it to the

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secretary of the defendant "to settle," the secretary testifying that "it was allowed that we owed him this amount." *Held*, that there was evidence for the jury on the question of the defendant's liability.

The declaration in an action of contract against a corporation contained three counts, the first being for alleged arrears of salary, the second for a fixed amount alleged to be due as a commission for bringing about a sale of shares of capital stock of the defendant, and the third, alleged to be for the same cause of action as the second, being on a *quantum meruit* for bringing about the sale of the capital stock. At the trial there was evidence for the jury on the first and the third counts, but none on the second. The defendant asked for a ruling as to each count that on all the evidence the jury should find for the defendant. The rulings were refused. The jury found a general verdict for the plaintiff for an amount equal to the amount claimed in the first count with interest from the date of the writ, which was less than the amount claimed in the second count, and the defendant alleged exceptions. While the defendant's exceptions were pending, but before they were entered in this court, the plaintiff filed a motion, alleging that "the evidence at the trial would have warranted" the verdict which was rendered "on the first count, and upon no other," and asking that the verdict be entered on the first count and that on the second and third counts judgment be entered for the defendant. The motion was allowed, subject to an exception by the defendant. *Held*, that the exception must be overruled because the defendant was not harmed by the granting of the motion and justice did not require a new trial.

CONTRACT, with a declaration in three counts. The first count was upon an account annexed for a balance of $438.70 and interest, alleged to be due to the plaintiff as salary as vice president and treasurer's assistant of the defendant from November 10, 1902, to March 15, 1903, at $50 per week. The second count was for bringing about a sale of capital stock of the defendant, the count alleging a special agreement made with the plaintiff by the defendant through its treasurer and manager, and claiming $1,000 as "the usual and customary commission" for the bringing about of the sale. The third count, alleged to be for the same cause of action as that set out in the second count, was upon a *quantum meruit* for the services in bringing about the sale of stock. Writ dated April 10, 1903.

The case was tried in the Superior Court before *Sherman*, J. The following is the substance of the material evidence:

As to the sale of stock, the plaintiff testified: "In the spring of 1902, a broker by the name of Solomon was employed by the treasurer [of the defendant], to obtain a purchaser for stock of the company, and a purchaser applied to him. Solomon requested some one connected with the company to take the matter up with this purchaser. The treasurer asked me to do this.

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I asked if I would be paid for my time, and she said I would be well paid for it. I took the matter up with the purchaser and he subsequently bought the stock and paid $20,000 for it. A commission was paid to Solomon."

The plaintiff further testified that in May of 1902 a conversation took place between one Amanda M. Lougee, treasurer and manager of the defendant, and himself in the presence of one William H. Chick, secretary of the defendant, in which Miss Lougee stated to him that she was contemplating taking a long vacation in Colorado and desired him to give his whole time to the defendant's business; that he told her that he should want $50 per week and "one per cent on sales" [of capital stock]; that she said she was willing to make a contract with him; that he said he should want a contract for one year; that she said she was willing to make such a contract, but that "the amount of commission was to be left until she came back, she thought it excessive, so we left it in abeyance"; that he went to work under that arrangement "for a year," and was paid the salary of $50 per week until the following November 10, when the treasurer refused to pay him more than $25 per week. It appeared that, at the rate of $25 per week since November 10, there was $3.70 due him at the date of the writ.

The plaintiff further testified that he rendered to the treasurer of the defendant a statement of the amount set out in the account annexed to the first count of the declaration, and that he had a conversation with the other directors of the defendant two hours before the annual directors' meeting. "They said they wanted to settle this thing up, and they wanted me on the board, and they thought we had better settle our differences. Miss Lougee said that. I said 'Well, do you acknowledge that you owe me?' She said, 'Well, I suppose I will have to.' And Mr. Chick spoke up and said, 'Remember what you are doing, because if you acknowledge you owe you have got to settle.' She said, 'Well, I admit I owe it.'" The plaintiff also testified that at the directors' meeting it was voted "that they settle with me, and Mr. Chick be appointed a committee of one to settle that claim and get it out of the way."

William H. Chick, called by the plaintiff, testified in corroboration of the plaintiff as to the agreement that he should be paid

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for his services $50 per week for a year, that the treasurer and manager was absent for about three months, and that the plaintiff managed the company while she was gone. As to the conversations on the day of the directors' meeting, and as to the plaintiff's claim for commissions for sale of capital stock, he testified: The plaintiff "brought a slip of paper on which he had made up his account, and spoke about what was owed him.... I stopped [Miss Lougee] and said, 'Now, Miss Lougee, if you talk about what you owe this man, or about how you are going to settle it, you accept this. Now do you consider you owe him this?' She said, 'I do, but we don't want to pay it now, but we want to fix up this matter so we can go along.' There was some talk about what cash he wanted and what balance would be paid in stock. His suggestion was to make payments of so much a week. That was the same day as the directors' meeting. Mr. Fallon was there, but he withdrew from the meeting. There was some talk among the directors about paying this money to him now. It was allowed he was owed this amount, but we wanted to try and make the best settlement we could. Then the meeting was adjourned, and they made me a committee of one to make that settlement. . . . There was nothing said to me direct at any time by Miss Lougee in regard to commission on account of stock sold. Mr. Fallon [the plaintiff] and I talked, and on his slip of paper I wrote 'Stock for Hyneman.' That was the claim for what was due him, and the way it was to be settled. He said, 'If I have got to get my claim for salary, I think I might as well have what is due me as commission.' I asked him if there was anything which he claimed was due him for commissions, and he said, 'I do,' and I wrote on the inside of that little paper, 'Stock for Mr. Hyneman,' — that is, commission for the stock sold to Hyneman. That was my abbreviation."

Later the witness Chick testified, "At the meeting of the directors it was the opinion of all present that they did not owe him anything."

The treasurer of the defendant testified that the arrangement she made with the plaintiff was that he should be paid $50 per week during her absence, and that nothing was said as to commissions; that when November was reached, she stated to the plaintiff that "the company could no longer afford to pay $50

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per week. but that $25 was all that it could pay the plaintiff thereafter"; that at the directors' meeting she stated that "we owed him [the plaintiff] nothing."

The president of the company testified in corroboration of the treasurer.

At the close of the evidence, the defendant asked for a ruling as to each count of the declaration that on all the evidence the plaintiff could not recover on that count. The rulings were refused, and all three counts were left to the jury, who on March 15, 1905, returned a general verdict for the plaintiff for $489.54; and the defendant alleged exceptions.

The defendant thereafter moved for a new trial on the ground that the verdict was against the evidence and the weight of the evidence, and that the verdict was contrary to law. The motion was denied on March 24, 1905.

On April 8, 1909, the plaintiff filed the following motion:

"And now comes the plaintiff and says that it appears by the record that the declaration was in three counts; that the first count was for services claimed to have been performed upon an agreement made with the defendant in the sum of $438.70 and interest; that the verdict was a general verdict in the sum of $489.54; that the evidence at the trial would have warranted that verdict on the first count, and upon no other.

"Wherefore he moves . . . that said verdict may be entered upon the first count thereof, and that on the second and third counts judgment be entered for the defendant."

The motion was allowed; and the defendant alleged a further exception.

E. F. McClennen, for the defendant.

J. Bennett, (*W. H. Mitchell* with him,) for the plaintiff.

SHELDON, J. 1. There was evidence that the treasurer of the defendant agreed with the plaintiff to pay him the sum of $50 per week for the services which he was to render; that he rendered these services with the knowledge and consent of the defendant and its officers; and that he was paid at that rate for about five months. This warranted a finding that the treasurer's agreement had been either originally authorized or subsequently ratified by the corporation. And Chick, the defendant's secretary, testified that when the plaintiff's bill was presented at a

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meeting of the directors, "it was allowed he was owed this amount, but we wanted to try and make the best settlement we could." His further testimony, apparently on cross-examination, that all the directors thought "that they did not owe him anything," was to be weighed only in connection with what he formerly had said. *Dunton* v. *Derby Desk Co.* 186 Mass. 35.

2. It may be, though we should hesitate so to decide, that a verdict for the plaintiff on the second count was not warranted. There was to be sure nothing to indicate what the usual commission in such a case was. But this is not now material; for if the jury allowed him any commission it is evident from the amount of the verdict that the finding as to that must have been upon the third count.

3. Upon the third count the evidence was meagre, but there was something for the jury. Besides the plaintiff's testimony as to his agreement with the treasurer it could be found on Chick's testimony that this matter too was brought before the board of directors by Chick's memorandum on the plaintiff's bill for services, and was included in their approval, in spite of Chick's further testimony already stated.

4. Under these circumstances, the defendant was not harmed by the order made on the plaintiff's motion that the verdict should be entered on the first count, and that judgment should be entered for the defendant on the second and third counts. The averment in that motion, "that the evidence at the trial would have warranted that verdict on the first count, and upon no other," may be treated as meaning only that a verdict for that amount, being the sum claimed in the first count with interest from the date of the writ, must have been rendered upon that count alone. Whether or not this conclusion is an absolutely necessary one, it is yet manifest that a judgment upon the verdict as amended gives to the plaintiff exactly what the jury found and were warranted in finding to be due to him, and finally disposes of all the issues in the case. Computation shows that the verdict was for the amount claimed in the first count with interest to the date of the verdict; and therefore it is highly probable, if not practically certain, that the verdict was rendered upon the first count only. See *Ashton*

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v. *Touhey*, 131 Mass. 26; *Commonwealth* v. *Delehan*, 148 Mass. 254; *Minot* v. *Boston*, 201 Mass. 10, 13. Justice does not require a new trial.

Exceptions overruled.

KATHERINE GLENNEN *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. November 18, 1910. — January 6, 1911.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Negligence, Street railway. *Evidence*, Relevancy and materiality. *Way*, Public.

Statement by RUGG, J., of the principles of law governing the liability of street railway companies for personal injuries received by their passengers and due, not to the instrumentalities or employees of the companies, but to acts and conduct of other passengers or strangers.

At the trial of an action against a street railway company to recover for injuries, received while the plaintiff was a passenger upon an open electric car of the defendant and caused by the conduct of a crowd which rushed upon the car and turned over seats, evidence tending to show that similar crowds acting in the same way customarily entered the defendant's cars at the same place and time of day and week and season of the year is relevant and material, since it tends to show that the defendant knew and had had an opportunity to guard against the condition which was the cause of the plaintiff's injury.

At the trial of an action by a woman against a street railway company to recover for injuries received while the plaintiff was a passenger upon an open electric car of the defendant on a Sunday afternoon in the summer, there was evidence tending to show that when the car reached a certain point which was near to a place of public resort by a river, it stopped for the purpose of having the trolley reversed and the backs of seats turned over preparatory to returning over its course, that the plaintiff, a woman, rose with a child in her arms to leave the car but was prevented from doing so by an on-rushing crowd who began turning over the backs of seats in the car and finally turned over the back of a seat against which the plaintiff was leaning and pinned her arm between the back and the seat; that while the crowd so was acting the motorman was on the front platform and the conductor on the rear platform and a person in the employ of the defendant called a "starter" was standing ten feet away. The place where the car stopped was a public street. Evidence was offered by the plaintiff tending to show that such crowds were customary at that place, time of day, week and season. Such evidence was excluded and a verdict was ordered for the defendant. *Held*, that the evidence should have been admitted and that the verdict for the defendant should not have been ordered, because there was evidence tending to show that the defendant, knowing of the danger to the plaintiff, had failed to exercise the care it should have exercised to guard her from injury; and that the fact that the conduct of the crowd was in a public street was of no consequence, since the question was not one of policing the public way, but of shielding a passenger.

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TORT by a woman for personal injuries received as stated in the opinion while the plaintiff was a passenger of the defendant on a car at Spring Street in that part of Boston formerly West Roxbury on May 19, 1907. Writ dated November 4, 1907.

The case was tried in the Superior Court before *Harris*, J. The facts are stated in the opinion. At the close of the plaintiff's evidence, a verdict was ordered for the defendant; and the plaintiff alleged exceptions.

The case was submitted on briefs.

F. Juggins & A. W. Shepard, for the plaintiff.

L. R. Chamberlin & R. A. Stewart, for the defendant.

RUGG, J. A common carrier of passengers is required to exercise the utmost care consistent with the nature and extent of its business to carry its passengers to their destination in security and enable them to alight there with safety. This extraordinary vigilance is owed, not only as to its own instrumentalities and employees but also as to other passengers or strangers, so far as any harmful misconduct on their part may be foreseen and guarded against. The highest degree of prudence and circumspection is exacted of the carrier in anticipating and suppressing violence to passengers from all outside sources. The precautions which the carrier must take in the performance of this duty depend upon the facts of each case. No positive regulation or absolute usage has been or can be defined as a final standard for the discharge of its obligation. The natural turbulence of a multitude of people to be expected at a public celebration may require provision against unusual occurrences. The kind of assembly and the character of people likely to attend it, the place from which they have come and to which they are going, the hour of the day and the normally accompanying impatience or restraint, the probable temper and disposition of a crowd in view of the causes which bring it together are all circumstances to be regarded in determining whether in any instance the carrier has performed the highly onerous and stringent obligation imposed on it. *Kuhlen* v. *Boston & Northern Street Railway*, 193 Mass. 341, and cases cited. *Beverley* v. *Boston Elevated Railway*, 194 Mass. 450.

On the other hand, a common carrier does not insure to its passengers immunity from harm. It is engaged in a public ser-

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vice which must be managed in such a manner as to be practical and adapted to the needs of contemporary society, both as to expense, convenience, comfort and rapidity. Hence it cannot be held responsible for manifestations of lawlessness, heedlessness, impetuosity or force which a high degree of prevision and sagacity could not reasonably be expected to forestall. Injury arising from the sporadic act of an individual or the aggregated impulses of a throng, if outside the limits of conduct reasonably to be apprehended by one under a strong legal duty to be most keenly sensitive to guard against preventable wrongs, affords no ground of liability. The carrier is not bound to adopt all possible precautions nor every conceivable safeguard for the safety of passengers, nor to exercise the utmost diligence which human ingenuity can imagine to avert injury. *Simmons* v. *New Bedford, Vineyard & Nantucket Steamboat Co.* 97 Mass. 361. *Joy* v. *Winnisimmet Co.* 114 Mass. 63. *O'Neil* v. *Lynn & Boston Railroad*, 180 Mass. 576. *Pitcher* v. *Old Colony Street Railway*, 196 Mass. 69. *Lyons* v. *Boston Elevated Railway*, 204 Mass. 227. *McCumber* v. *Boston Elevated Railway*, *post*, 563. These principles are well settled and have been steadily adhered to. It is not necessary to cite or review the many other cases by which they are illustrated, but only to apply them to the facts before us.

The plaintiff was a passenger upon one of the defendant's open cars, and reached the terminus of the route near a portion of the Charles River reservation, between five and six o'clock on a Sunday afternoon in May. She was accompanied by her son two and one-half years old. It was customary at this terminus, which was on a public street, for the trolley to be reversed, the seats turned over, and for the car to start to return on the same track. At the time of the events to be narrated the conductor was on the rear platform. The motorman was at his post on the front platform, and there was a starter in the employ of the defendants eight or ten feet away from the car. A great many people were in the habit of going to this reservation, and a boathouse was nearby, where canoes were kept. When the car came to a stop at its terminus the plaintiff's description of what happened was as follows: "I started to get out of the car . . . there was a crowd of people there — there

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seemed to be about a hundred people or more. There was a great crowd rushed on to the car and started turning over seats. . . . There was a great confusion. I started to get out of the car and I was pushed back . . . into my seat again. . . . I grasped hold of the stanchion, but I was forced back in again into my seat. . . . [The child] was in my arms; I was going to step down off the car. . . . I had my arm on the back of the seat . . . waiting for a chance to get out of the car, when this seat in back was turned over and pinned my arm between the backs of the two seats. . . . Passengers [were] getting on to the railing and on the outside; on the right hand and on the left as well. . . . Right around me it seemed that most of [the seats] were turned over." She further testified that no employee of the defendant said or did anything to restrain the crowd or assist her, and that the events she had described happened within a period of two or three minutes. The plaintiff offered to show that on preceding Sundays of 1907 and 1906, at about the same hour, there had been rushing and crowding and jostling by passengers in getting upon the cars at this place, but this line of inquiry was excluded subject to her exception.

Evidence as to what has been the custom of a crowd at a particular place or under special circumstances in boarding the defendant's cars was competent, because a railway company has reasonable cause to know what has been habitually done respecting its cars. It bore upon the care which the defendant ought to have exercised and the protection which it ought to have furnished to its passengers who were entitled to alight even in the face of a large number of people desiring to become passengers. *Nichols* v. *Lynn & Boston Railroad*, 168 Mass. 528. The evidence as to the conduct of crowds of the year before the accident at the same season of the year, when it may be fairly inferred that conditions as to the reservation, boathouse and use of canoes were substantially the same, had some tendency in the same direction. The plaintiff appears to have gone far enough to bring herself within the operation of this rule. The fact that the trial judge excluded the line of inquiry excused her from making of so complete an offer of proof as would otherwise have been necessary.

It is also to be observed that the plaintiff was a woman en-

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cumbered with a small child and entitled to protection commensurate with the impaired capacity to care for herself resulting from this burden. *Hamilton* v. *Boston & Northern Street Railway*, 193 Mass. 324. Her own testimony as to the length of time elapsing after the car stopped and before her injury and the facts that she had once risen from her seat and been forced back into it by the violence of the crowd and, having risen again, was compelled to pause for opportunity to step, and that while thus waiting the seat was thrown against her, tend to show that the boisterousness was not an instantaneous act without forewarning, but was of appreciable duration and might be found to have afforded in connection with all the other attendant conditions a premonition such as to call for action on the part of the conductor or starter. That this occurred upon a public street rather than in a station under the exclusive control of the defendant is not decisive in its favor.

It is not a question of policing the public way, but of shielding its passenger while in the car.

Evidence of unruly conduct of crowds at this place on previous occasions when the circumstances were similar should have been received and the case submitted to the jury.

Exceptions sustained.

ALONZO W. PERRY *vs.* J. L. MOTT IRON WORKS COMPANY.

Suffolk. November 18, 1910. — January 6, 1911.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Landlord and Tenant, Construction of lease, Covenant of lessee as to condition of premises. *Covenant. Contract*, In writing. *Evidence*, Extrinsic affecting writings. *Words*, "Repair."

A covenant of a lessee, to put the leased premises "in as good repair as they were in at the beginning of said term," does not require him to remove trade fixtures of permanent construction which with the consent of the lessor he had added to the premises during the term of the lease, and which after the termination of the lease it was necessary for the lessor to have removed in order to make the premises rentable.

The owner of a store leased it to a corporation engaged in the business of selling bathroom and sanitary fixtures and plumbers' supplies, the lease containing the

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following provisions: That the lessee would "not injure, overload or deface the premises in any way, or suffer or permit the premises or any part thereof, during or at the determination of these presents, to be injured, overloaded or defaced in appearance, whether by removal of any fixture or otherwise; and . . . not make any alterations or additions during the term . . . except such as are hereinafter permitted . . . and peacefully yield up to the lessor the premises, and all erections and additions made to or upon the same, clean and in good repair in all respects. . . . And it is agreed that the lessee may make such alterations and additions within said leased premises as may be necessary for his business, and may remove at the termination of this lease such tiling and special fittings as have been put in at his own expense, provided he puts the premises in as good repair as they were in at the beginning of said term." The lessee, with the knowledge and consent of the lessor, for its purposes built upon the premises six bathrooms with plaster walls covered with tiling and installed appropriate fixtures and tiled floors and a balcony, all of permanent construction, and at the termination of the tenancy, the lessee not removing such structures, the lessor, because their removal was necessary in order that the premises might be let to another tenant, removed them and by an action of contract sought to recover from the lessee the expense thereby entailed. *Held*, that the words in the lease, "provided he puts the premises in as good repair as they were at the beginning of said term," did not require the lessee to remove the structures in question, and therefore, since the structures were installed with the lessor's consent, he could not recover from the lessee the expense of removing them.

A lease in writing by the owner of certain premises to a corporation contained the following provision: That the lessee would "not injure, overload or deface the premises in any way, or suffer or permit the premises or any part thereof, during or at the determination of these presents, to be injured, overloaded or defaced in appearance, whether by removal of any fixture or otherwise; and . . . not make any alterations or additions during the term . . . except such as are hereinafter permitted . . . and peacefully yield up to the lessor the premises, and all erections and additions made to or upon the same, clean and in good repair in all respects. . . . And it is agreed that the lessee may make such alterations and additions within said leased premises as may be necessary for his business, and may remove at the termination of this lease such tiling and special fittings as have been put in at his own expense, provided he puts the premises in as good repair as they were in at the beginning of said term." In an action by the lessor against the lessee to recover under the lease the expense of removing certain trade fixtures of permanent construction installed by the lessee, the lessor offered in evidence a preliminary agreement to lease signed by the parties, which contained the following: "The lessee is to have the right to make such alterations and additions within said leased premises as may be necessary for his business, and to remove at the end of said term such tiling and special fittings as he puts in at his own expense, hereby agreeing to put the premises in as good repair as they are at the beginning of said term, reasonable wear and tear excepted." The preliminary agreement was excluded. *Held*, that the lease was neither obscure nor ambiguous, and that the preliminary agreement rightly was excluded.

CONTRACT by the lessor against the lessee under a lease in writing of premises numbered 378 on Boylston Street in Boston, the first count being for charges under the lease for lighting,

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the second for charges for water, and the third and fourth as stated in the opinion. Writ in the Municipal Court of the City of Boston dated August 30, 1906.

On appeal to the Superior Court the case was heard by *Wait*, J., without a jury. The defendant admitted liability under the first and second counts. The facts relating to the third and fourth counts are stated in the opinion. As to such facts, the parties agreed that, "if the defendant was bound to restore the premises at the expiration of the lease to the same general condition in which they were before any changes were made by the lessee, reasonable use and wear thereof excepted, then it is agreed that the premises were not so left by the lessee. If the defendant was not bound to restore the premises at the expiration of the lease to the same general condition in which they were before any changes were made by the lessee, reasonable use and wear thereof excepted, but was only bound to leave them in the same general condition as they had been put by reason of the change made by it, the lessee, reasonable use and wear thereof excepted, then it is agreed that they were so left by the lessee. If upon the foregoing facts the plaintiff is entitled to recover for removing the alterations and additions made by it and restoring the premises to their former condition, it is agreed that he shall recover the sum of $626.48, and if he is entitled to recover for loss of rent because of the time consumed thereby, it is agreed that it took the plaintiff, using reasonable despatch ten days or one third of a month to remove the alterations and additions and restore the said premises to their former condition, and that a fair rental for the store in June, 1906, when such work was done by the plaintiff was $6,000 per year."

The document which was offered in evidence by the plaintiff and is referred to in the last paragraph of the opinion was an agreement by the defendant to take a lease of the premises in question, and contained certain provisions as to things to be done by the lessor and to be permitted to be done by the lessee. Among the latter was the following:

"The lessee is to have the right to make such alterations and additions within said leased premises as may be necessary for his business, and to remove at the end of said term such tiling and special fittings as he puts in at his own expense, hereby agreeing

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to put the premises in as good repair as they are at the beginning of said term, reasonable wear and tear excepted."

The trial judge found for the defendant on the third and fourth counts of the declaration; and the plaintiff alleged exceptions.

J. E. Hannigan, for the plaintiff.

G. V. Phipps, for the defendant.

RUGG, J. This is an action of contract upon a lease of a store for a term of six years and two months. Its provisions now material were that the lessee would "not injure, overload or deface the premises in any way, or suffer or permit the premises or any part thereof, during or at the determination of these presents, to be injured, overloaded or defaced in appearance, whether by removal of any fixture or otherwise; and . . . not make any alterations or additions during the term . . . except such as are hereinafter permitted . . . and peacefully yield up to the lessor the premises, and all erections and additions made to or upon the same, clean and in good repair in all respects. . . . And it is agreed that the lessee may make such alterations and additions within said leased premises as may be necessary for his business, and may remove at the termination of this lease such tiling and special fittings as have been put in at his own expense, provided he puts the premises in as good repair as they were in at the beginning of said term." The defendant pursuant to the lease built upon the premises six bathrooms with plaster walls covered with tiling, and installed appropriate fixtures and tiled floors, and a balcony, all of permanent construction for the purpose of adapting the premises for its business of selling bathroom and sanitary fixtures and plumbers' supplies. At the expiration of its lease the defendant did not remove any of these additions and alterations. This action is brought to recover the expense of removing them in order to adapt the premises to other uses and the rent for the time required in doing the work.

The trial judge found that the bathrooms were trade fixtures, but were so constructed as to constitute an alteration and addition, and were built with the knowledge and consent of the lessor, but added nothing to the value of the premises, and their removal was necessary in order to let the premises to another tenant. Under these circumstances the plaintiff cannot recover

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unless some provision of the lease gives this right. *Pfister & Vogel Co.* v. *Fitzpatrick*, 197 Mass. 277. It is plain that by the express terms of the lease changes like those actually made were contemplated and allowed. It is contended, however, that the conditional clause in the final paragraph of the lease expressed in the words "provided he puts the premises in as good repair, as they were at the beginning of the term" applies as well to the permission to make the alterations and additions as to that to remove them. The rule of grammatical construction of language is that a qualifying word or phrase ordinarily refers to its nearest antecedent, and that although punctuation may be disregarded when the intent of the instrument seems so to require, yet it may be resorted to when it seems to throw light on the interpretation. *Greenough* v. *Phœnix Ins. Co.* 206 Mass. 247, 251, and cases cited. "Repair" as here employed naturally means a mending of the waste or decay incident to a removal rather than a restoration to an original state, when the alterations or additions were sound and without deterioration as structures. "Repair" is not equivalent to "condition" in this connection. This is confirmed by the earlier provision of the lease to the effect that all erections and additions, if left, should be yielded up to the lessor "clean and in good repair." Nor can it be said that these additions "defaced" the premises and hence should have been removed by the tenant. They were not defacements but useful adaptations to the needs of the tenant, for which they were designed. Construing the lease as a whole and giving reasonable effect to its several provisions, it appears to give to the lessee the option of removing the additions and alterations at the expiration of the term, and if this option is exercised the premises must be left undefaced in appearance and not in any state of depreciation by such removal; but if the option was not exercised, then the premises, together with all additions, must be left for the landlord in a good state of repair, reasonable wear and unavoidable casualties excepted. As the tenant did not elect to exercise the privilege of removal, the plaintiff could not compel him to make such removal. Therefore he cannot recover.

The evidence as to the contents of the preliminary agreement for the lease was properly excluded under the familiar rule that when a contract is formally reduced to writing, without fraud or

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mistake, and is signed, all previous or contemporaneous discussions and memoranda are either rejected or embodied in it, which alone expresses the agreement. There is no such obscurity or ambiguity about the language employed or the subject-matter involved as to open the door for explanation. *Commonwealth Trust Co.* v. *Coveney*, 200 Mass. 379. *Jennings* v. *Puffer*, 203 Mass. 534, and cases cited.

Exceptions overruled.

JOHN BOCK & another *vs.* KITTIE C. WALL.

Norfolk. November 18, 1910. — January 6, 1911.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Evidence, Relevancy and materiality, Of motive. *Prescription.*

At the trial of a petition filed in 1906 under the mill act by an upper riparian owner for damages alleged to have been suffered by the petitioner by reason of his land being flowed by a mill dam maintained by the respondent below him, where the respondent contended that she had a right by prescription to maintain the dam at the height objected to by the petitioner, the respondent was allowed to introduce in evidence a deed by one, who formerly had owned the respondent's premises and adjacent land, conveying to another in 1876 the adjacent land and covenanting for himself and his heirs and assigns, for a reason stated, to maintain the dam "to at least its present height," which was the height to which the petitioner objected. *Held*, that the deed was admitted rightly as tending to show that the grantor and his successors had a motive to do what the respondent, one of the successors, contended that they had done.

Where it is a material question whether a certain person did a certain act, the existence of a motive on his part to do or to refrain from doing that act is relevant.

PETITION, filed on August 2, 1906, under R. L. c. 196, for damages sustained by the petitioners, upper riparian proprietors on the Stop River, by reason of the flooding of their land by water set back by the respondent's dam below them.

The respondent in her answer alleged "that she and those under whom she claims have had peaceable possession and occupation of said mill and water works and dam and have maintained said dam at its present height for more than twenty years prior to the first day of August, 1903."

The case was tried in the Superior Court before *Wait*, J. The jury found for the respondent; and the petitioners alleged exceptions.

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The facts material to these exceptions are stated in the opinion.

R. Clapp, for the petitioners.

H. E. Ruggles, (*J. B. Crawford* with him,) for the respondent.

SHELDON, J. The question contested was whether the respondent's dam had been maintained at its present height for more than twenty years before the bringing of the petition. The evidence was conflicting. There was evidence that in 1876 one Campbell owned the respondent's premises and an adjacent piece of land upon which a pond had been created by this dam. The respondent was allowed to put in evidence a deed of the adjacent land given in March, 1876, by Campbell to the New York and New England Railroad Company, in which deed Campbell covenanted for himself and his heirs and assigns to maintain this dam "to at least its present height," so that the water in the pond should not be drawn down below its level then existing. The petitioner contends that this was erroneous.

In our opinion the deed was rightly admitted. It created, or could be found to have created, an obligation upon Campbell and his successors in title to keep the dam at the same height that it then was; and there was evidence that this was the same height at which it had been ever since maintained. The deed brought about a permanent condition of affairs affecting the use of Campbell's estate and imposing a duty upon all future owners thereof. The existence of such a duty and obligation furnished a motive, perhaps a strong motive, on the part of Campbell and his successors to comply with its requirements and thus avoid the liability under which they otherwise might be placed. But when it is disputed whether certain persons have done a certain act, the existence of a motive on their part to do or to refrain from doing that act is relevant. *Hanson & Parker* v. *Wittenberg*, 205 Mass. 319, 327. This is the underlying element in such cases as *Clark* v. *Brown*, 120 Mass. 206, and those cited in *Conklin* v. *Consolidated Railway*, 196 Mass. 302, 306. The rule has been frequently applied in criminal cases, in which it is held that while the prosecution is not obliged to show a motive for the commission of an alleged crime, evidence of the existence of such a motive is competent and material. *Commonwealth* v. *Richmond*, *ante*, 240. *Commonwealth* v. *Jeffries*, 7 Allen, 548,

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566. The rule is stated and the authorities are collected in 12 Cyc. 149, 150. It follows that this deed was rightly admitted, not as a declaration of the grantor, but to show that he and his successors had a motive to do what the respondent contended that they did do, and thus to corroborate the other evidence upon which she relied.

The petitioners did not care to press their exception to the admission of the letter from the secretary of the receivers of the railroad company, if the deed was rightly admitted.

The circumstances before us and the ground of our decision differ entirely from those that appeared in the cases relied on by the petitioners.

Exceptions overruled.

GEORGE L. MAYBERRY, executor, *vs.* CHARLES H. SPRAGUE.

Suffolk. November 28, 1910. — January 6, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Equity Jurisdiction, Accounting. *Election. Judgment. Equity Pleading and Practice*, Taking bill *pro confesso*, Exceptions to rulings of judge, Final decree.

A bill in equity by an executor for an accounting, alleging that the defendant received $1,000 which in accordance with the terms of a certain contract he held in trust for the plaintiff's testator and which he wrongfully and fraudulently refused to turn over to the plaintiff and "wrongfully and fraudulently appropriated to his own use," states a good ground for relief, and a demurrer to it should be overruled.

A judgment in an action at law recovered against "the goods and estate" of a certain debtor in the hands of his assignee for the benefit of his creditors is not a judgment known to the law, and for that reason might perhaps be treated as a nullity, but, treating it as a judgment, it does not show an election on the part of the judgment creditor to look to the assignee personally for the satisfaction of his claim, and thus is no bar to a suit in equity by such creditor against the assignee seeking an accounting for and a recovery of the sum of money in his hands alleged to belong in equity to the plaintiff.

Where in a suit in equity the defendant fails to answer, it is right for a judge to order that the bill shall be taken *pro confesso*, and it is no reason for not making such an order, that the facts alleged show no ground for relief and do not warrant a decree, because taking the bill *pro confesso* merely means that the truth of the facts pleaded is established.

Where in a suit in equity exceptions to rulings made by the judge who heard the case are pending, the power of the judge to enter a final decree is suspended until the exceptions are disposed of.

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BILL IN EQUITY, filed in the Superior Court on August 14, 1908, and, after a demurrer to it had been sustained, amended by the filing of a substituted bill on December 31, 1908, by which the plaintiff, as the executor of the will of Henry G. Houghton, sought to collect the balance of an execution, obtained by him in an action at law, against the goods and effects of Everett E. Hapgood and Swift N. Long in the hands and custody of the defendant as the assignee for the benefit of creditors of Hapgood and Long, as stated at length in the opinion.

The defendant demurred to the substituted bill. The demurrer was argued before *Richardson*, J., who made an order overruling the demurrer. The defendant alleged an exception to this order, which was allowed by the judge.

Later the case came on to be heard before the same judge on a motion of the plaintiff that the bill should be taken *pro confesso* for the reason that the defendant had failed to file an answer in accordance with an order of the court requiring him to file an answer on or before a certain day.

The defendant objected to the allowance of the motion and asked the judge to rule that the bill would not support any decree. The judge overruled the defendant's objection and refused to rule as requested, and ordered that the bill should be taken *pro confesso*. The defendant excepted to the refusal of the judge to rule as requested and to the order, and alleged exceptions, which were allowed by the judge.

Still later the case came on to be heard before *Wait*, J., on the plaintiff's motion for the entering of a final decree.

The judge made a decree that there was due from the defendant to the plaintiff the sum of $1,249.07 with interest thereon from July 6, 1908, and the defendant was ordered to pay forthwith to the plaintiff that sum of money with such interest, together with the costs of suit taxed at $25.53.

The defendant asked the judge to rule that the bill would not support this decree. The judge refused so to rule, and the defendant excepted.

The judge then ordered that the decree be entered, and the defendant excepted to the order. Thereupon the judge at the request of the defendant entered an order that the defendant have ten days in which to file his bill of exceptions. The de-

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fendant alleged exceptions, which were allowed by the judge, if the matters alleged were properly the subject of exception.

The case was submitted on briefs.

H. J. Jaquith, for the defendant.

W. V. Taylor, for the plaintiff.

LORING, J. The only question presented by the first bill of exceptions is whether the defendant's demurrer to the plaintiff's bill in equity was rightly overruled.

The following facts are alleged in the bill: The plaintiff's testator was a creditor of the firm of Hapgood and Long, and the defendant was a common law assignee of their property for the benefit of their creditors. Before the assignment the plaintiff's testator had brought an action against the firm in which he had trusteed one Turnbull. The firm claimed that Turnbull owed them upwards of $1,400, but this was disputed by Turnbull. Thereupon, on a day in April, 1902, not stated, the testator and the defendant assignee came to the following agreement, to wit: The assignee purchased the testator's claim and agreed to pay him therefor $1,375 from the funds collected from Turnbull, and, if so much as $1,375 should not be collected from Turnbull, then the assignee was to make up the difference from other funds belonging to him as assignee as aforesaid. The "respondent Sprague subsequently received from said Turnbull $5,000 in settlement, which he holds as trustee for your complainant and which he wrongfully and fraudulently refuses to turn over to your complainant, and which he has wrongfully and fraudulently appropriated to his own use." The plaintiff brought an action at law "against respondent Sprague in his capacity as assignee aforesaid," a verdict was ordered for the plaintiff, and he now holds an unsatisfied execution against the goods and estate of the firm in the hands of Sprague (the defendant) for $1,249.07. A copy of this execution is annexed to the bill, and it appears from it that the sum of $1,249.07 is due with interest from July 6, 1908.

By the allegations of the bill which the defendant has admitted to be true he received from Turnbull $1,000, which he "fraudulently appropriated to his own use." Under the agreement between the testator and the defendant the money received from Turnbull was the money of the plaintiff's testator in the hands of the defendant and therefore he could maintain a

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bill in equity against the defendant for an accounting and to recover it.

It follows that this bill is well brought unless there is something in the technical defenses set up by the defendant to escape from accounting to the plaintiff for the money of the testator which he admits he "wrongfully and fraudulently appropriated to his own use." His main reliance is on the fact that the plaintiff brought an action at law on the contract. If he had sued the defendant personally for a breach of the contract there would have been ground for the contention that he had elected not to treat the fund of $1,000 as his own. But so far as appears the plaintiff did not undertake to hold the defendant liable for breach of the contract. What he seems to have undertaken to do was to bring an action at law which would result in a judgment against the funds of the firm in the defendant's hands. The execution recites that the plaintiff has "recovered judgment against the goods and estate which were of Everett E. Hapgood of Boston, in our County of Suffolk, and Swift N. Long of Cambridge, in said County of Middlesex, in the hands and custody of Charles H. Sprague of said Cambridge, assignee for the benefit of creditors of said Everett E. Hapgood and Swift N. Long, for the sum" etc. It would seem that what the plaintiff tried to do was to recover against this defendant as assignee the same sort of judgment that a creditor of a deceased person recovers against his executor or administrator. But the creditor of an assignor cannot recover such a judgment against his common law assignee. Moreover the judgment recited in the execution here in question is not the judgment entered in an action by a creditor of a deceased person against his executor or administrator. The judgment in such a case is that the defendant, as he is executor or administrator of the deceased, owes the plaintiff so much money, and the execution issued on that judgment runs against the goods and estate of the deceased in the hands and possession of the executor or administrator. A "judgment against the goods and estate" of a person named is not a judgment known to the law, and for that reason it might perhaps be treated as a nullity. But however that may be, by taking such a judgment (if it is to be treated as a judgment) the plaintiff did not elect to look to the defendant personally for breach of his

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contract and to give up his right to the $1,000 in the defendant's hands as his money. See *Attorney General* v. *American Legion of Honor*, 196 Mass. 151. There is nothing in the other technicalities raised by the defendant which requires notice.

The second bill of exceptions presents the question whether the defendant having failed to answer, the judge was right in directing that the bill should be taken *pro confesso*. The defendant urges that he was wrong in so doing because the facts alleged do not warrant any decree. If it were true that the facts alleged do not state a cause of action and so do not warrant a decree, that is no reason for not entering a decree that they are true. All that taking a bill *pro confesso* means is that the truth of the facts pleaded is established.

The third bill of exceptions sets forth two exceptions: one to a refusal to rule that the bill would not support a decree. That we have disposed of in deciding that the demurrer was rightly overruled. The other is an exception to entering any decree at all. This exception must be sustained. So long as exceptions are pending the power of the court to enter a final decree is suspended. *McCusker* v. *Geiger*, 195 Mass. 46.

The last exception must be sustained. All other exceptions must be overruled.

So ordered.

HARRISON DUNHAM *vs.* CHARLES W. BLOOD, trustee.

Suffolk. December 2, 1910. — January 6, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Trustee. Bills and Notes.

If a trustee, who has no authority to borrow money for the trust estate, borrows money and gives a promissory note in the name of the estate signed by him as trustee, the note is the individual note of the person who signed it as trustee, and the holder of the note has no remedy against the trust estate, unless that estate is indebted to the trustee and the holder of the note has an equitable right to stand in the trustee's shoes, which here was not the case.

BILL IN EQUITY, filed in the Superior Court on August 18, 1910, against the trustee under the will of William R. Clark, of Boston, seeking to enforce the payment out of the trust estate of a promissory note payable to the plaintiff, dated August 14,

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1905, for $274 and interest, which was signed as trustee in the name of the estate by William R. Clark, Jr., who at that time was the sole trustee under the will of his father, William R. Clark.

In the Superior Court the case was heard by *Hitchcock*, J., who made the following memorandum of decision:

"On August 4, 1905, the plaintiff at the request of William R. Clark, Jr., a former trustee under the will of William R. Clark, paid $274 to the collector of taxes for the city of Boston for taxes then due on certain real estate held by the trustee under the trust created by the will. Clark gave to the plaintiff the memorandum which is set out in the bill of complaint, upon which certain payments were subsequently made to the plaintiff by Clark, leaving the amount of $151.50 now unpaid on the loan. William R. Clark, Jr., died in May, 1910, previous to which time the real estate on which the taxes were assessed which were paid by the plaintiff had been disposed of. The defendant was appointed trustee under the will on July 14, 1910, and the real estate did not come into the possession of the defendant as trustee and has not been subject to the trust in the hands of the defendant. No authority was granted to Clark as trustee to borrow any money by any court. The accounts of Clark as trustee have not yet been settled.

"The memorandum referred to does not constitute an indebtedness for which the trust estate in the hands of the defendant is liable. The defendant is entitled to a decree that the bill be dismissed."

The plaintiff alleged exceptions to the rulings and order in the foregoing decision, which were allowed by the judge.

H. Dunham, pro se.

C. W. Blood, pro se.

LORING, J. When a trustee, even if he is authorized to do so, borrows money in behalf of his trust and gives a note as trustee, the note is his individual note, *Fiske* v. *Eldridge*, 12 Gray, 474, *Towne* v. *Rice*, 122 Mass. 67, *Plimpton* v. *Goodell*, 126 Mass. 119, and he has a remedy over against the trust estate of which the note holder can avail himself. In the case at bar the fact that the note in question was signed "Estate of William R. Clark, by William R. Clark, Jr., Trustee," does not change this result; the note was the note of Clark. He had no

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authority to borrow money and so the plaintiff has no remedy over. *Tuttle* v. *First National Bank of Greenfield*, 187 Mass. 533 In this case the money lent by the plaintiff was lent to the trustee and became his money. The case differs in that respect from *Newell* v. *Hadley*, 206 Mass. 335. If the plaintiff has any remedy over against the trust estate it is through the plaintiff's right to stand in the trustee's shoes. But it is not shown that as between the trustee and the trust anything is due to the trustee.

Exceptions overruled.

NATICK AND COCHITUATE STREET RAILWAY COMPANY *vs.* INHABITANTS OF WELLESLEY.

Norfolk. December 5, 1910. — January 6, 1911.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Tax, Excise. *Street Railway*, Excise tax on gross receipts.

Under St. 1906, c. 463, Part III. §§ 134, 135, in computing the excise tax which is to be assessed by the assessors of every city and town in which a street railway is operated on each street railway company operating a railway therein of an amount equal to such proportion of the percentages named in the statute of the gross receipts of such company as the length of tracks operated by it in public ways and places of such city or town bears to the total length of tracks operated by it in public ways and places, the gross earnings of such a company, actually operating its road on the thirtieth day of September in any year, must be ascertained by dividing its total gross receipts for the preceding year by the number of miles of its tracks upon that day, regardless of the changes in its mileage that have taken place during the year by reason of consolidation or otherwise.

PETITION filed in the Superior Court on April 4, 1910, under R. L. c. 12, § 78, now St. 1909, c. 490, Part I. § 77, appealing from the refusal of the assessors of the town of Wellesley to abate an excise tax of $632.06 upon the gross earnings of the Natick and Cochituate Street Railway Company for the year ending September 30, 1909, assessed under St. 1906, c. 463, Part III. §§ 133–135.

In the Superior Court the case was submitted to *King*, J., upon an agreed statement of facts as follows:

From October 1, 1908, through November 30, 1908, the Natick

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and Cochituate Street Railway Company operated street railway tracks in the town of Wellesley.

On October 15, 1909, that company filed with the board of assessors of the town of Wellesley a sworn statement, from which it appeared that in the above named period of two months the number of miles operated was 6.184. The total number of miles of track belonging to the company was 18.758 and the gross passenger earnings for the period were $16,471.35.

On December 1, 1908, acting under St. 1906, c. 463, Part III. §§ 53 *et seq.*, and in accordance with an order of the board of railroad commissioners dated November 23, 1908, the Natick and Cochituate Street Railway Company and also the Westborough and Hopkinton Street Railway Company consolidated with the Middlesex and Boston Street Railway Company and turned over all its property and franchises to the consolidated company, which bears the name of Middlesex and Boston Street Railway Company. The gross passenger earnings of the Middlesex and Boston Street Railway Company in the two months, beginning October 1, 1908, and ending November 30, 1908, were $15,551.43.

From December 1, the Middlesex and Boston Street Railway Company operated the tracks in the town of Wellesley and elsewhere formerly belonging to the Natick and Cochituate Street Railway Company and also the tracks formerly belonging to the Westborough and Hopkinton Street Railway Company. The total mileage of tracks belonging to the consolidated company was 41.155, and the mileage in the town of Wellesley was 6.184. In the period from December 1 to July 1 the gross passenger earnings of the Middlesex and Boston Street Railway Company were $113,118.40.

On July 1, 1909, acting under St. 1906, c. 463, Part III. §§ 53 *et seq.*, and under an order of the board of railroad commissioners dated June 25, 1909, the Newton Street Railway Company was absorbed by the Middlesex and Boston Street Railway Company, which acquired its property and franchises. The Newton Street Railway Company had 43.974 miles of track and the total mileage of the Middlesex and Boston was therefore increased to 85.129 miles. New track was built in Natick to the amount of .563 miles, making the total September 30, 1909, 85.692 miles.

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The gross passenger earnings of the Middlesex and Boston Street Railway Company operating this mileage from July 1 to October 1, 1909, were $169,258.42. The gross passenger earnings of the Newton Street Railway Company for the nine months ending June 30, 1909, were $253,536.98, and on these earnings the Newton Street Railway Company made returns and paid the excise tax in the cities and towns in which it operated.

On October 15, 1909, the Middlesex and Boston Street Railway Company filed with the assessors of the town of Wellesley a sworn return giving details for the assessment of the excise tax.

On December 16, 1909, the board of assessors of the town of Wellesley assessed upon the Natick and Cochituate Street Railway Company an excise tax of $632.06. The amount of the bill was the amount of the tax for the previous year (1908). No tax was assessed upon the Middlesex and Boston Street Railway Company.

On January 27, 1910, the Natick and Cochituate Street Railway Company applied to the board of assessors of the town of Wellesley for an abatement of the tax of $632.06 assessed upon that company. A hearing was given by the assessors on this application, and on February 17, 1910, the board of assessors gave to the company notice that the application had been refused.

It was agreed that the assessment in question, although made upon the Natick and Cochituate Street Railway Company, might be treated as having been assessed to the Middlesex and Boston Street Railway Company, and that, should the court decide that the amount of the tax should be abated to the amount called for by the returns of the two companies filed on October 15, 1909, the assessment upon the Natick and Cochituate Street Railway Company should be reduced to the aggregate amount called for by said returns, that is, to $269.30.

It further was agreed that if, upon the foregoing facts the assessors of Wellesley could, upon any theory, have assessed a tax of $632.06 the tax was to stand. It also was agreed that the tax had been paid.

It was agreed that the above might be assumed to be the facts, in the absence of other evidence, and that the court might draw inferences of fact.

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The town of Wellesley asked the judge to make the following rulings:

"1. Upon all the evidence the petitioner is not entitled to an abatement.

"2. In assessing an excise tax under the St. 1909, c. 490, Part III. § 48, the assessors of a town are not bound by the return of a street railway company, but may use any information they can obtain in the assessment of the tax. [This ruling was made.]

"3. In making the return required by St. 1909, c. 490, Part III. § 47, the street railway company is not justified in taking the mileage as of any particular date and is not justified in taking the mileage as of September 30, or as the last day of the financial year of the street railway company.

"4. If the mileage of a street railway, liable to an excise tax under said § 47, varies during a financial year, the mere fact that the statute does not provide any *prima facie* method for ascertaining the mileage to be taken in determining the annual gross earnings per mile does not prevent taking the average mileage for the year, and if a street railway company does not, in such a case, take the average mileage for the year, the assessors of a town are justified in disregarding the return of the street railway company and in taking the average mileage of a year in ascertaining the gross earnings per mile.

"5. In assessing an excise tax under § 48, the assessors, if there are consolidations during a financial year, may disregard the consolidation and treat the consolidated company as one whole company, taking its earnings, including those of the constituent companies for the entire year, and taking the mileage including that of the constituent companies for the entire year, and in assessing a tax based upon the earnings and mileage so ascertained.

"6. In assessing a tax upon a street railway company which has taken over other street railway corporations during a financial year, the assessors are justified in assessing a tax upon the consolidated company based upon the earnings of the consolidated company and the average mileage of the consolidated company for the portion of the year during which the consolidated company operated.

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"7. It is the duty of a consolidated company which takes over other companies during a financial year to pay the tax of the company so taken over, and to make a return for those companies. [This ruling was made except the last clause.]

"8. Taking the mileage of a street railway company as of the last day of the financial year would exclude the payment of tax if the street railway company was not in existence upon that date or was not operating upon that date.

"9. The tax may be assessed after November 15, in any year as well as before. [This ruling was made.]

"10. It is the duty of a consolidated company to pay the excise tax based upon the earnings and mileage of its entire system for the entire year including that of its constituent companies.

"11. The mileage which is to be taken in ascertaining the excise tax is the mileage out of which and in connection with which the earnings have been produced and not an arbitrary mileage based upon the mileage of some specific date.

"12. The Natick and Cochituate Street Railway Company was not required by law to make an excise tax return for the period prior to its consolidation with the Middlesex and Boston Street Railway Company, but the Middlesex and Boston Street Railway Company was bound to make such a return in connection with its own return and to pay the excise tax assessed thereon.

"13. In determining excise tax under said § 47, the assessors may either treat the consolidated company as though it had been one corporation through the entire year and take its earnings and mileage as those of one company, including as a part, the mileage and earnings of all the companies consolidated with it during the year, and assess a tax thereon, or may take the earnings and mileage of each constituent company during the period in which they operate separately and independently and assess a tax thereon and take the earnings of the consolidated company and the average mileage of the consolidated company for the period after the consolidation and assess a tax thereon."

The judge made the second and ninth rulings requested as above, and made a part of the seventh ruling requested omitting the words "and to make a return for those companies," and refused to make any of the other rulings requested. He found that the petitioner was entitled to an abatement of a part of the tax

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assessed against it, to wit, to an abatement of the sum of $362.76, thereby reducing the tax by such abatement to the sum of $269.30. The respondent alleged exceptions.

G. A. Sweetser, for the respondent.

A. A. Ballantine, for the petitioner.

SHELDON, J. The difficulty here arises from the fact that the Legislature has not in terms provided for a case in which the mileage of a street railway has been of different lengths at different times of the year, according as it has been increased or diminished by new construction or abandonment, by purchases or sales, or, as here, by consolidations of different companies.

It was provided by St. 1906, c. 463, Part III. § 133, as follows: "A street railway company, including a company whose lines are located partly within and partly without the limits of the Commonwealth, whether chartered or organized under the laws of this Commonwealth or elsewhere, shall annually, on or before the fifteenth day of October, make and file in the office of the board of assessors of every city and town in which any part of the railway operated by it is situated a return signed and sworn to by its president and treasurer, stating the length of track operated by it in public ways and places in such city or town, and also the total length of track operated by it in public ways and places, determined as provided in section one hundred and twenty-five, and also the amount of its gross receipts during the year ending on the preceding thirtieth day of September, including therein all amounts received by it from the operation of its railway, but excluding income derived from sale of power, rental of tracks or other sources." And by § 134 it was provided that on or before the first day of November annually, the assessors of every city or town in which a street railway was operated should assess upon the company operating the railway an excise tax, to be assessed upon the average gross receipts per mile according to the proportions between the length of tracks operated by it in public ways and places in such city or town and the total length of tracks operated by it in public ways or places. This tax is assessed in lieu of the obligations formerly imposed on street railway companies to keep in repair certain parts of the public ways and places in which their tracks are laid. *Greenfield & Turners Falls Street Railway* v. *Greenfield*, 187 Mass. 352. A

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method was provided therefore by petition to the board of railroad commissioners for the revision of the amount of this excise or commutation tax; and it was enacted by § 137 of the same statute, as amended by St. 1907, c. 318, that the total amount of this tax received by a city or town should be applied towards the repair and maintenance of its public ways and the removal of snow therefrom. See now St. 1909, c. 490, Part III. §§ 47–51.

The petitioner's contention, which was adopted in the Superior Court, is that in such a case as this the statute requires each one of the original companies to make a return to each city or town for the period during which it actually operated tracks in such city or town before the consolidation; that the consolidated company must make a return of the gross earnings actually received by it during the year and of the length of its trackage on the thirtieth day of September; and that the tax of each company is to be determined by dividing its gross earnings by the number of miles operated by it on the last day of the period of its earnings, — that is, upon the thirtieth day of September if the company was then in existence and operating its road. It is only the last part of this contention however that it now is necessary for us to pass upon; for the parties have agreed that the assessment here in question, although made to the petitioner, may be treated as if it had been made to the consolidated company, the Middlesex and Boston Street Railway Company, and that if upon the agreed facts the assessors of Wellesley could upon any theory have assessed the tax which they did assess, the tax is to stand. And likewise it is not disputed that if the correct divisor of the total gross receipts of the consolidated company for the year ending September 30, 1909, was the number of miles operated by it on that day, the abatement made by the Superior Court was proper.

The respondent makes two alternative contentions. First, it contends that the proper divisor of the total earnings of the consolidated company for the year ending September 30 was not the number of miles operated by the company on that day, a number much increased by the consolidations which had been made during the year, but the average number of miles of track operated during the year. This contention it presented to the judge at the trial directly by its fourth and sixth requests for rulings, and

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indirectly by its eleventh request. Its second contention was that the entire system of the consolidated company as it existed on September 30, 1909, should be taken as one system for the entire year ending on that day, for the purpose of assessing this excise or commutation tax, — in other words, that a tax should be assessed upon the consolidated company as if the consolidations had been made before the beginning of the tax year instead of having been made during the year, and should be assessed upon the total earnings received during the year by the constituent companies and the consolidated company taken together. It presented this contention to the judge by its fifth, tenth and twelfth requests and part of its seventh request. Its first and thirteenth requests were made upon both of its contentions. Its first, third and eleventh requests were for rulings adverse to the petitioner's contention. Its second and most of its seventh requests were given. Its eighth request becomes immaterial when the others shall have been passed upon.

The section (Sts. 1906, c. 463, Part III. § 133; 1909, c. 490, Part III. § 47) which requires a return of the total length of track operated does not fix the date upon which that length is to be taken, unless by inference. It is obvious that the length might be different at different periods of the year. But the section contains two provisions which throw some light upon the question to be decided. The return is to be made on or before the fifteenth day of October, and it is to state the length of the tracks in the particular city or town to whose assessors the report is required to be made; and the total length of tracks operated by it in other public ways and places, and also the amount of the gross receipts during the year ending on the preceding thirtieth day of September. That is, the statutory command contemplates a closing of the accounts of the company so as to show the gross receipts of the year as of a fixed date. In the absence of any fixing of the day on which the length of the tracks was to be determined, it would be natural to say that the same day was contemplated for this purpose as was fixed for the statement of the gross receipts. The day intended could not be a day either before or after the thirtieth day of September; and it seems to us, when there is no such expression of the legislative will, that it would be putting a strained construction upon the words of

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the statute to say that they required a computation of the average number of miles operated during the year in each city or town and in the aggregate line of the road. But another criterion is furnished by the statute. It prescribes as a rule for determining the length of track that it is to be "determined as provided in" § 125 of St. 1906, c. 463, Part III.; § 40 of St. 1909, c. 490, Part III. Referring to these two sections, we find that in slightly different words, but with manifestly the same meaning, they require street railway companies to state in their returns the length of track operated by them in each city or town on the thirtieth of September, to be determined by measuring as single track the total length of all tracks operated by them, including sidings and turn-outs, whether owned or leased by them, or over which they have trackage rights only. It is plain that under the rule here prescribed the companies must not only measure the length of their tracks by including all sidings and turn-outs and by treating all tracks, whether single or double, as single tracks, but this method of measurement must be applied to the state of things existing on the thirtieth day of September. A return of measurements made on any other day, or of the average length of tracks where there had been during the year any new construction or abandonment or any other change of trackage, would not comply with the requirements of the statute. The fact that in practice the fixing of the day upon which the facts are to be ascertained is of quite as much importance as determining the mode of measurement to be adopted, makes it at least probable that the reference in the one section to the other was intended to include the first element as well as the second. Both of these elements are alike essential in making a true statement of the length of trackage operated.

It is said in behalf of the town that taking the mileage as of the last day of the tax year works an injustice, in that the gross earnings per mile of track are unduly decreased by dividing the total earnings by a length of mileage of which a part, possibly a large part, has not been in existence and has earned nothing during perhaps a large part of the year. But the same argument might be made as to the distribution of the corporate franchise tax provided for by St. 1909, c. 490, Part III. § 43, which under § 64 of the same act is to be "apportioned among the

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several cities and towns in proportion to the length of tracks operated by such company in said cities and towns respectively." This length of tracks must by the terms of § 40 of the same act be the length measured as therein prescribed upon the thirtieth day of September; and any city or town in which there had been a large increase of trackage during the preceding year, or a great diminution of trackage during that time, would receive proportionally an increased or diminished share of the corporate franchise tax to the corresponding loss or gain of the other cities or towns in which the same company had tracks. The truth seems to be that to avoid the necessity of making unduly complicated computations and because in the long run there seemed no likelihood of serious injustice even if there might be some temporary inequalities, the Legislature saw fit to provide that in those matters the determination should be made in all respects as of a fixed day, just as in the assessment of ordinary taxes individuals are to be taxed upon such taxable property as they are found to possess upon a day certain, although when the amount of their tax has been ascertained and becomes payable, it generally will be the case that some persons will have to pay a tax upon an amount in excess of what they are worth while others will find that large amounts of property which they have acquired since the day of assessment have wholly escaped the burden of taxation. In each case, the Legislature has reasonably determined that in this way the private burden and the public benefit of taxation will be distributed and received as justly and proportionately as is really practicable; and this contention we cannot revise.

For similar reasons, we cannot adopt the second contention made by the town. We find nowhere in the statutes any reference to such a mode of computation or any indication that this was intended by the Legislature. A consolidated company does succeed to all the liabilities and obligations of its constituent companies. It must pay the taxes for which they were liable. It must make its own returns and pay its own taxes. But we know of no authority and no ground of principle for saying that consolidations which took place respectively in December of 1908 and July of 1909 can be treated by assessors of taxes as having taken place before September 30, 1908. What we have

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said as to a disregard by the Legislature of some temporary inequalities in the assessment and distribution of this excise or commutation tax by the assumption of a day certain for the making up of all accounts and the ascertainment of the then existing state of affairs, applies also to this contention.

Moreover it must be borne in mind that this claim of the town, if adopted, would be applicable, not only to a case of consolidation such as is here presented, but to cases where the road of one company has been purchased or acquired under adversary proceedings by another. We gather from an opinion of the Attorney General, to which we have been referred by counsel (Attorney General's Report for 1908, p. 2), that a part of the system of the present consolidated company was purchased by it in July, 1907, from the receiver of another company. If so, the receiver, who doubtless would need the books of the insolvent company for his own purposes, probably did not turn them over to the purchasing company, and that company would be unable to make in the next October the returns as to the operations of the insolvent company between September 30, 1906, and July, 1907, which according to the present contention of the town it would be bound to make under a penalty. Other situations readily can be imagined in which a company would be unable to give the previous gross receipts of other companies whose lines it had acquired. Nor if the officers of those acquired companies had failed to keep proper books of account or had falsified their accounts, would it be just to visit a penalty for such wrongdoings upon the acquiring company, which presumably acted with complete innocence. We ought not to suppose, in the absence of provisions of the statutes, that the Legislature intended to impose a penalty upon a corporation for anything but its own act or the act of its authorized officers or agents.

We are led to the conclusion that the contention of the petitioner is correct, that the gross earnings per mile of a street railway company under our statutes, certainly of such a company actually operating its road on the thirtieth day of September, must be ascertained by dividing its total gross receipts for the year by the number of miles of its trackage upon that day.

It follows that the respondent's exceptions must be overruled.

So ordered.

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ANDREW C. REGGIO, trustee, *vs.* WINSLOW WARREN, trustee, & others.

Suffolk. December 5, 1910. — January 6, 1911.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Equity Jurisdiction, Negligence of plaintiff, Mistake, Unjust enrichment, Rescission. *Mistake. Trust. Unjust Enrichment.*

In a suit in equity seeking to set aside a release signed by the plaintiff, releasing to the trustees under a certain will all right of the plaintiff to receive any further payment under the will, under which the plaintiff was a beneficiary and also was one of three trustees, the bill alleged, that there was due to the plaintiff as a beneficiary a large sum of money, that the trustees had not the required money on hand and could not raise such a sum for immediate payment without serious loss to the trust estate, that the plaintiff and his co-trustees all believed that, under the circumstances then existing, the trustees had full power, with the consent of the plaintiff, to retain for the purposes of the trust a large part of the money due to the plaintiff and to pay to the plaintiff the amount due to him partly in cash and the larger part by a promissory note signed by the three trustees bearing interest at a stated rate, that this was done, and that the plaintiff executed the release in question to the trustees, but that afterwards, by a decision of this court, the trustees learned that the note given by them to the plaintiff was void because they had no right to make it. The plaintiff sought to have the release which he had signed cancelled, in order that he might receive the balance of the money due to him which the trustees could not pay him lawfully upon the note. The defendants demurred, and contended that the bill on its face showed negligence in the plaintiff, inasmuch as he did nothing to ascertain by his own investigation the facts upon which his rights depended or to determine what his rights were but relied merely on the assurances of his co-trustees. *Held*, that it could not be said that the bill showed such negligence on the part of the plaintiff as to preclude him from obtaining relief.

Discussion by SHELDON, J., of the exceptions to the rule that equity will not grant relief to avoid the results of a mutual mistake of law.

One, who innocently has left in the hands of the trustees under a will, as part of a trust fund, money to which he legally was entitled and the payment of which he could have enforced, and in exchange therefor has received a promissory note of the trustees bearing interest at a fixed rate, which afterwards turns out to be void because the trustees had no right to make it, but which both he and the trustees believed to be valid and binding, and who on receiving the note has given to the trustees a release and discharge, running both to them and to the trust estate, from all liability except upon such note, upon discovering the invalidity of the note and filing a bill in equity against the trustees, can avoid or rescind his release and obtain the money or the part of the trust fund which was his rightful due, where it appears that the trust estate has parted with nothing of value in or by reason of the transaction and that the only effect of refusing the relief asked for will be to deprive the plaintiff of the money to which he had the lawful right and which all the parties supposed that they had secured to

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him by what they had done and correspondingly to enrich the trust fund at his expense and furnish for the beneficiaries in remainder a large amount of money, to which they have no claim and to which it never was intended by anybody that they should acquire any claim.

In a suit in equity, by a beneficiary under a will against the trustees under the same will, to rescind a release given by the plaintiff to the defendants on receiving from them a comparatively small part, of a large sum of money to which he was entitled, in cash and much the greater part of it in the form of an interest bearing promissory note, which afterwards turned out to be void because the trustees had no right to make it, the fact, that there may have been a partial consideration for the giving of the release in the comparatively small amount of money paid to the plaintiff in cash at the time that the void note for the larger amount was delivered, does not make it impossible to give relief, if the circumstances under which the note was received by the plaintiff and the release was given by him show that he otherwise is entitled to have the release rescinded.

In a suit in equity, by a beneficiary under a will against the trustees under the same will, to rescind a release given by the plaintiff to the defendants on receiving from them a comparatively small part, of a large sum of money to which he was entitled, in cash and much the greater part of it in the form of an interest bearing promissory note, which afterwards turned out to be void because the trustees had no right to make it, where it appears that before the invalidity of the note was discovered the defendants had made a part payment upon it to the plaintiff, it is not necessary for the plaintiff, in order to entitle himself to a decree for the rescission of the release, to offer to return the money which he received in cash at the time he gave the release or that which was paid to him later as a part payment on the void note, as both of these sums of money belonged to him, irrespective of the validity of the note, and he need not go through the vain ceremony of repaying or offering to repay these sums, which, if repaid, it would at once become the duty of the defendants to return to him with a much larger additional sum.

A beneficiary of a trust under a will, who also is one of three trustees under the same will, does not lose any of his rights as a beneficiary on account of a loss incurred by the trust estate by reason of a mistake of judgment of the trustees, in which he shared as a trustee but for which neither he nor the other trustees were liable under the terms of the trust.

BILL IN EQUITY, filed in the Supreme Judicial Court on December 9, 1909, by a legatee under the will of Andrew Carney, who also was one of the trustees under that will, against his co-trustee, seeking to set aside a certain release executed by the plaintiff and to have paid to the plaintiff the share of the estate to which he would have been entitled had the release not been executed.

The allegations of the bill were as follows:

1. That the defendant, Winslow Warren, was duly appointed trustee under the will of Andrew Carney, deceased, by the Probate Court for the county of Suffolk in 1887, and has been at all times since, and now is, one of the trustees of that estate.

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2. That the plaintiff, Andrew C. Reggio, was duly appointed a trustee under the will of Andrew Carney, deceased, of Boston by a decree of the Probate Court of the county of Suffolk in 1891, and has been at all times, and now is, such trustee.

3. That at the time of the acts complained of Joseph A. Laforme, late of Boston, was the third trustee, and was appointed by a decree of the Probate Court under the terms of the will of the late Andrew Carney; that Joseph A. Laforme continued as trustee of the estate up to the time of his death in 1905.

4. That the sole trustees of the estate under the will of the late Andrew Carney now are Andrew C. Reggio and Winslow Warren.

5. That Andrew Carney died on April 3, 1864, after making a will and codicil, which were duly approved and allowed by a decree of the Probate Court in and for the county of Suffolk on April 25, 1864.

6. That Andrew Carney, by this will and codicil, gave property in trust for his adopted daughter, Pamelia J. Reggio, and her three children, Josephine Elizabeth Reggio (afterwards Josephine Elizabeth Pazolt), Mary Frances Reggio (afterwards Mary Frances Rhodes), and Andrew Carney Reggio, each to have one quarter income for life, with remainders over to their respective children or the issue of deceased children taking by right of representation.

7. That, under the will, Andrew C. Reggio should have in fee one half of one quarter of that portion of the estate given him for life, if he should so request in writing after he became of age; and that, said Reggio having made the request, the one half of that one quarter was conveyed and transferred to Andrew C. Reggio in 1888.

8. That Josephine Elizabeth Pazolt died in June of 1899; and on May 16, 1901, in accordance with the will, her share of the property was distributed in equal shares to her two sons, Arthur N. and Alfred J. Pazolt.

9. That Pamelia J. Reggio died in April of 1902, and, in accordance with the terms of the will, her portion of the trust estate should be distributed in the following proportions: two fifteenths to Andrew C. Reggio, two fifteenths to Mary F.

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Rhodes, one fifteenth to Arthur N. Pazolt, and one fifteenth to Alfred J. Pazolt.

10. That on or about January 1, 1903, the trustees determined that the value of the share held in trust for the benefit of Pamelia J. Reggio was $409,290, so that Arthur N. Pazolt and Alfred J. Pazolt were entitled to receive the sum of $68,215 each, and that Mary F. Rhodes and the plaintiff were entitled to receive $136,430 each.

11. That on or about January 6, 1903, the trustees paid to Arthur N. Pazolt and Alfred J. Pazolt the sum of $68,215 each in cash. The trustees also paid to Mary F. Rhodes and to the plaintiff $16,430 each, and gave to each a promissory note, whereby the estate of Andrew Carney promised to pay, on demand, the sum of $120,000, with interest at four per cent.

12. The note given to Mary F. Rhodes as hereinbefore described has been paid in full.

13. The note given to the plaintiff is now held by him, and is unpaid, either in whole or in part, except as to the sum of $20,000 received by the plaintiff from the trustees as part payment on or about April 1, 1905, which payment was duly indorsed on the note.

14. That up to 1905 Joseph A. Laforme and Winslow Warren were the active trustees of this estate; that Andrew C. Reggio was appointed trustee while abroad in Germany, and continued to live in Germany and in England until the autumn of 1901, when he came to reside permanently in America; and that while thus abroad he was kept informed of trust matters through letters and other communications from the trustees in America.

15. That after coming to America, and for a period including the time of the acts hereinafter complained of, he was not sufficiently familiar with the business matters of the trust to exercise independent judgment on such matters, but during this time conferred with his co-trustees, and, believing in their judgment and wisdom, ultimately agreed with them on such matters as they were agreed upon relating to the administration of the trust.

16. That on or about January 1, 1903, the trustees, Laforme and Warren, represented to the plaintiff, and the fact was, that the trust estate was short of funds to make a distribution of the

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Pamelia J. Reggio interest in the trust fund in cash; that to do so they would be obliged to sell property, which could not then be sold advantageously to the interest of the trust estate; that they were also using large sums of money for the construction and erection of what is called the Carney Building, the arrangements for erecting which had been entered into before the death of Pamelia J. Reggio, which arrangements could not be abandoned without great loss to the trust estate; and that the plaintiff was requested to permit his share of the trust fund, which he was entitled to on the Pamelia J. Reggio distribution. to be retained in the trust estate.

17. That the trustees Laforme and Warren assured the plaintiff that under the terms of the will, and under the circumstances then existing, the trustees had the power and authority, the plaintiff consenting, to retain a portion of the trust fund which the plaintiff would be entitled to under the Pamelia J. Reggio distribution, and to give the plaintiff therefor a promissory note binding the trust estate to the future payment of the sum so retained.

18. That on or about February 18, 1903, the plaintiff, relying upon the assurances of the said trustees, consented to let the trustees retain certain funds which he was entitled to on the Pamelia J. Reggio distribution, and the plaintiff accepted from the trustees the sum of $16,430 in cash and received from said trustees a promissory note from the estate of Andrew Carney for the sum of $120,000, the balance due of his portion of the Pamelia J. Reggio distribution, the note being made payable on demand, with interest at four per cent per annum.

19. That thereafter, to wit, on or about February 1, 1905, the plaintiff received from said trustees, as part payment of the money due as represented by the note, the sum of $20,000, which was indorsed on the back of the note, leaving due and payable, as part of the funds due him on the Pamelia J. Reggio distribution, the sum of $100,000, no part of which has been paid.

20. That at or about the same time, to wit, on February 16, 1903, the plaintiff, at the request of the trustees Laforme and Warren, and relying on the assurances of the said trustees as set forth in paragraph 17, executed and delivered a release of all demands against the estate of Andrew Carney arising out of

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said distribution; that said release was executed and delivered on the consideration that the plaintiff should receive in exchange therefor a valid and enforceable instrument which should entitle him to receive from the trust estate the full sum of $120,000, representing, to that extent, his distributive share.

21. That the plaintiff and all of the trustees believed that under the will, and under the circumstances which then existed, the trustees had full power and authority, the plaintiff assenting, to retain, in the manner aforesaid, the sum to which the plaintiff was entitled upon the death of Pamelia J. Reggio, and, instead of distributing the same in cash to the plaintiff, to give the plaintiff a promissory note as aforesaid, which note should be in all respects valid and binding upon the trust estate.

22. That the plaintiff is now informed and believes, and therefore alleges, that the trustees, under the circumstances which existed, had no power or authority to give the note or to enter into such a transaction as hereinbefore described; that the note is unenforceable and void; that the execution and delivery of the note by the trustees, and the execution and delivery of the release by the plaintiff, were due to a mutual mistake of the defendant, said trustee Laforme, and the plaintiff — all the parties acting in the firm belief that they were authorized by the will so to do.

23. That, by reason of such mutual mistake, the consideration for the release has failed so far as the plaintiff's right to receive the sum of $120,000 is concerned, and unless the mutual mistake shall now be duly rectified the plaintiff is in danger of suffering, as a result thereof, the loss of his entire distributive share, to the amount of $120,000, as a penalty for permitting the amount of said distributive share to be retained by the trustees for the benefit of the trust estate, instead of insisting upon the immediate payment thereof, as he otherwise could and would have done.

The prayers of the bill were as follows:

1. That the release be declared void and of no effect and that it be ordered that the same be delivered up and cancelled, the plaintiff being ready and willing on his part to deliver up the note to be cancelled, if the court shall so order.

2. That it be declared that the plaintiff is entitled, as one of the distributees, on the death of Pamelia J. Reggio, to the same

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share of the trust estate as if the note and release had never been executed, proper credit being given for any payments made on account of the note.

3. That an account be taken of all payments so made and that the net amount which the plaintiff is entitled to receive as such distributee be determined.

4. For further relief.

On December 13, 1909, the children of Mary Frances Rhodes, named in the bill, filed by leave of court an intervening petition to be joined as defendants. On January 31, 1910, an interlocutory order was made, that they be joined as defendants. The defendants thus admitted to the suit filed an answer, which contained a demurrer, and which, further answering, admitted the facts alleged in the first, second, third, fourth, fifth, sixth, seventh, eighth and tenth paragraphs of the bill, and denied in whole or in part the other allegations of the bill.

Loring, J., made an order under Chancery Rule 35 appointing a commissioner to take the evidence to be reported to the full court, and later made the following finding and reservation:

"I find that the facts alleged in the thirteenth, fifteenth, sixteenth, seventeenth, eighteenth, twenty-first, and twenty-second paragraphs of the bill of complaint are true.

"As to the allegations set forth in the twentieth paragraph thereof, I find that the release was executed and delivered on the assumption, in which all parties concurred, that the note then delivered to the plaintiff was a valid and enforceable instrument, which would entitle him to recover from the trust estate $120,000 lent by him to said estate.

"I find that the plaintiff was not negligent in the matter.

"I reserve the case for the consideration of the full court on all the pleadings, evidence, and on these findings."

J. F. Cusick, for the plaintiff individually and as trustee under the will of Andrew Carney.

M. Storey, for Winslow Warren, trustee.

E. R. Anderson, (*G. A. Sweetser* with him,) for Mary Frances Carridia and others, beneficiaries in remainder.

SHELDON, J. We assume, under the language of the reservation, that these remaindermen who at their request have been

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admitted as parties defendant, did not waive their demurrer by going to a hearing on the merits.

They contend that the bill upon its face shows negligence in the plaintiff, on the grounds that he did nothing to ascertain by his own investigation the facts upon which his right depended, or to determine what his rights were; that he relied merely on the assurances of his co-trustees, believing in their judgment and wisdom, and now resting upon an allegation that he and "all of the trustees believed that under said will, and under the circumstances which then existed, said trustees had full power and authority, the complainant assenting, to retain, in the manner aforesaid, the sum to which the complainant was entitled, upon the death of Pamelia J. Reggio, and, instead of distributing the same in cash to the complainant, to give said complainant a promissory note as aforesaid, which note should be in all respects valid and binding upon the trust estate." These defendants insist that there is no allegation in the bill that he had a right to rely on or to believe his co-trustees, nothing to show upon what the belief of the trustees or his own belief was based, or to indicate that it was a reasonable belief or one that should have been relied on.

The bill does not proceed upon any allegation of deceit or fraud; and the decisions in which it has been held that there are fraudulent representations of such a character that one cannot be justified in believing them or in acting upon them are not applicable. Even in such cases the strictness of the old rule has been somewhat relaxed, in order that parties guilty of actual fraud may not too easily escape from liability for their wrong doing by setting up the undue guilelessness of their victim. *Way* v. *Ryther*, 165 Mass. 226, 229. *Kilgore* v. *Bruce*, 166 Mass. 136, 138. *Mabardy* v. *McHugh*, 202 Mass. 148, 149, 150, and cases cited.

This bill proceeds purely on the ground of a mutual mistake on the part of persons who were in confidential relations with each other, who were not undertaking to deal with each other at arm's length, and who desired to give to the plaintiff and his sister their legal rights in such a manner as to avoid causing thereby any loss to the body of the trust estate by forcing its property and securities upon a depressed and reluctant market. There was here no violation of any legal duty owed by the

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plaintiff to the other parties, his co-trustees, with whom he was dealing; there was nothing to indicate that his acting upon their common belief and refraining from requiring them to pay to him in cash the money to which he was entitled could result, or that it has resulted, in any loss or injury to the trust estate or to these remaindermen. He is not to be charged with any such laches or acquiescence as was found in *Stone* v. *Godfrey*, 5 De G., M. & G. 76. Under more stringent circumstances it could not be said that the bill showed such negligence on his part as to preclude him from obtaining relief. See the cases collected in 2 Pom. Eq. Jur. § 856. The demurrer cannot be sustained on this ground.

These defendants also contend that the mistake set forth in the bill was a pure mistake of law, for which no redress can be given. It is a general doctrine that, as it is the duty of every one to conform his conduct to the requirements of the law, so all men must be treated alike in courts of civil and of criminal jurisdiction, as being aware of the duties and obligations which are imposed upon them by the law, and that ordinarily one cannot successfully ask for affirmative relief or defend himself against an otherwise well founded claim, on the bare ground that he was either ignorant of the law or mistaken as to what it prescribed. *Powell* v. *Smith*, L. R. 14 Eq. 85. *Rogers* v. *Ingham*, 3 Ch. D. 351. *Freeman* v. *Curtis*, 51 Maine, 140. *Rice* v. *Dwight Manuf. Co.* 2 Cush. 80. *Taylor* v. *Buttrick*, 165 Mass. 547. *Wheaton Building & Lumber Co.* v. *Boston*, 204 Mass. 218, 226.

But it is now well settled that this rule is not invariably to be applied. In some cases where great injustice would be done by its enforcement, this has been avoided by declaring that a mistake as to the title to property or as to the existence of certain particular rights, though caused by an erroneous idea as to the legal effect of a deed or as to the duties or obligations created by an agreement, was really a mistake of fact and not strictly one of law, and so did not constitute an insuperable bar to relief. *Wilcox* v. *Lucas*, 121 Mass. 21, 25. *Livingston* v. *Murphy*, 187 Mass. 315. *Busiere* v. *Reilly*, 189 Mass. 518. *Eustis Manuf. Co.* v. *Saco Brick Co.* 198 Mass. 212. *Blakeman* v. *Blakeman*, 39 Conn. 320. *M'Carthy* v. *Decaix*, 2 Russ. & M. 614, 621. In other cases, a distinction between ignorance or mistake as to a

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general rule of law prescribing conduct and establishing rights and duties, and one as to the private right or interests of a party under a written instrument, has been laid down; and it has been declared that, while relief could not be given by reason of a mistake of the former kind, one of the latter kind shared by both parties to an agreement and resulting in a loss of the rights of one of them, may be set aside at the suit of the injured party, though no fraud was practised upon him. The distinction taken is between the general law of the country, for ignorance of which no one is excused, and private rights which depend upon the existence of particular facts and the rules which the law declares as to those facts. *Cooper* v. *Phibbs*, L. R. 2 H. L. 149, 170. *Beauchamp* v. *Winn*, L. R. 6 H. L. 223. *In re Oliver's Settlement*, [1905] 1 Ch. 191, 197, 198. *State* v. *Paup*, 18 Ark. 129. In other cases, sometimes as the ground of decision and sometimes merely in discussion or argument, it has been said that there is no established rule forbidding the giving of relief to one injured by reason of a mistake of law, but that whenever it is clearly shown that parties in their dealings with each other have acted under a common mistake of law and the party injured thereby can be relieved without doing injustice to others, equity will afford him redress. *Freichnecht* v. *Meyer*, 12 Stew. 551. *Lawrence County Bank* v. *Arndt*, 69 Ark. 406. *Ryder* v. *Ryder*, 19 R. I. 188. *Hausbrandt* v. *Hofler*, 117 Iowa, 103, quoting and following *Stafford* v. *Fetters*, 55 Iowa, 484, and *Ring* v. *Ashworth*, 3 Iowa, 452. *Snell* v. *Insurance Co.* 98 U. S. 85. To the same effect see *Swedesboro Loan & Building Association* v. *Gans*, 20 Dick. 132, in which the old rule as to ignorance of the law is said to be subject to so many exceptions that it is quite as often inapplicable as applicable; *Williams* v. *Hamilton*, 104 Iowa, 423, in which the court declares it to be well settled that a mistake as to law may under certain circumstances afford ground for relief in equity; and *Allcard* v. *Walker*, [1896] 2 Ch. 369, 381, in which the proposition that relief never can be given in respect to a mistake of law was called inaccurate. So it has been said that the important question was not whether the mistake was one of law or of fact, but whether the particular mistake was such as a court of equity will correct, and this depends upon whether the case falls within the fundamental principle of equity

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that no one shall be allowed to enrich himself unjustly at the expense of another by reason of an innocent mistake of law or of fact entertained by both parties. *Park Brothers & Co.* v. *Blodgett & Clapp Co.* 64 Conn. 28. *Blakemore* v. *Blakemore*, 19 Ky. Law Rep. 1619, 1620. *Dinwiddie* v. *Self*, 145 Ill. 290, 305. *Benson* v. *Bunting*, 127 Cal. 532. *United Commercial Travellers of America* v. *McAdam*, 125 Fed. Rep. 358, 368. *Stone* v. *Godfrey*, 5 DeG., M. & G. 76, 90. *Naylor* v. *Winch*, 1 Sim. & Stu. 555, 564. *Re Saxon Life Assurance Society*, 2 Johns. & Hem. 408, 412. This doctrine frequently has been applied to cases of the reformation of contracts; *a fortiori*, it is to be applied to cases in which justice can be obtained only by a complete rescission. *Canedy* v. *Marcy*, 13 Gray, 373. *Stockbridge Iron Co.* v. *Hudson Iron Co.* 107 Mass. 290, 299. *Griswold* v. *Hazard*, 141 U. S. 260, and cases cited on p. 284. *Carrell* v. *McMurray*, 136 Fed. Rep. 661. Cases in which a release has been either avoided or restricted in its operation by a limitation of its general words rest really upon the same principle. *Ramsden* v. *Hylton*, 2 Ves. Sen. 305. *Lyall* v. *Edwards*, 6 H. & N. 337. *Turner* v. *Turner*, 14 Ch. D. 829. *In re Garnett*, 31 Ch. D. 1. So one who has made an election under a will may rescind it upon proof that he acted under a misapprehension of his legal rights or even in ignorance of the fact that he was bound to make an election. *Watson* v. *Watson*, 128 Mass. 152. *Macknet* v. *Macknet*, 2 Stew. 54. *Pusey* v. *Desbouvrie*, 3 P. Wms. 315, 316. *Salkeld* v. *Vernon*, 1 Eden, 64.

The correct doctrine both upon principle and authority was stated by the Supreme Court of Michigan in *Renard* v. *Clink*, 91 Mich. 1, 3: "While it is a general rule that equity will not relieve against a mistake of law, this rule is not universal. Where parties, with knowledge of the facts, and without any inequitable incidents, have made an agreement or other instrument as they intended it should be, and the writing expresses the transaction as it was understood and designed to be made, equity will not allow a defense, or grant a reformation or rescission, although one of the parties may have mistaken or misconceived its legal meaning, scope, or effect. . . . But where a person is ignorant or mistaken with respect to his own antecedent and existing private legal rights, interests, or estates, and enters into some

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transaction, the legal scope and operation of which he correctly apprehends and understands, for the purpose of affecting such assumed rights, interests, or estates, equity will grant its relief, defensive or affirmative, treating the mistake as analogous to, if not identical with, a mistake of fact." And this statement by the court is amply supported by a full and apt citation of cases.

The approved text writers have taken the same view. Kerr (Fraud & Mistake, 4th ed., 467) thus sums up his treatment of the subject: "When, therefore, a man, through misapprehension or mistake of the law, parts with or gives up a private right of property, or assumes obligations upon grounds upon which he would not have acted but for such misapprehension, a court of equity may grant relief if, under the general circumstances of the case, it is satisfied that the party benefited by the mistake cannot in conscience retain the benefit or advantage so acquired." Pomeroy, in his treatise on Equity Jurisprudence, after an elaborate discussion of the question in the light of the decided cases, lays down substantially the same proposition in language which has been cited and approved in many of the decisions already referred to. 2 Pom. Eq. Jur. § 849. And see further the note to 1 Story Eq. Jur. § 111.

These principles are decisive of the present contention. As to this point the bill, reduced to its lowest terms, presents the question whether one who has innocently left in the hands of trustees money, being a part of the trust fund, to which he was legally entitled and the payment of which he could have enforced, and in consideration thereof has received from the trustees merely a void promise that it shall be paid to him from the trust estate in future, with interest at a fixed rate, which promise both he and the trustees believed to be valid and binding, and who thereupon has given to them a release and discharge, running both to them and to the trust estate, from all liability except upon the void promise, can upon discovering the invalidity of the promise avoid or rescind his release and obtain the money or the part of the trust fund which was his rightful due, it appearing that the trust estate has parted with nothing of value in or by reason of the transaction and that the only effect of refusing the relief asked for will be to deprive him of the money to which he had the lawful right, and which all

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parties supposed that they had secured to him by what they had done, and correspondingly to enrich the trust fund at his expense and to secure to the beneficiaries in remainder a large amount of money to which they had no claim and to which it never was intended or imagined by themselves or anybody else that they should acquire any claim. The bare statement of this question is enough. We are led irresistibly to the conclusion that the demurrer cannot be sustained upon this ground.

Nor can these remaindermen derive any benefit from such cases as *Tuttle* v. *First National Bank of Greenfield*, 187 Mass. 533, *Loring* v. *Brodie*, 134 Mass. 453, *Dunham* v. *Blood*, *ante*, 512, or the decisions in which one who has made an unauthorized loan to a city or town has been denied recovery either upon the invalid note which he has taken or upon the money counts by proof that the money had been applied to the use of the town. The case at bar differs from those cases in the fact that here there was not an unauthorized loan to the trustees which created no liability against the trust estate, but there was an antecedent liability of the trust estate to the plaintiff which he might have recovered from that estate by appropriate proceedings and which never has been paid. If he had given no release, the fact that he had accepted a void note for the amount that was due to him would not have prevented him from enforcing the original obligation. *Leonard* v. *First Congregational Society*, 2 Cush. 462, 464. *Small* v. *Franklin Mining Co.* 99 Mass. 277. *Weddigen* v. *Boston Elastic Fabric Co.* 100 Mass. 422. *National Granite Bank* v. *Tyndale*, 176 Mass. 547. *Central National Bank* v. *Copp*, 184 Mass. 328. Nothing now stands in his way but the release which it is the object of his bill to set aside. That differentiates the case from the decisions upon which the remaindermen rely. Of course, so far as the enforcement against the trustees of the note bearing a fixed rate of interest was concerned, the plaintiff did stand in a position similar to that of the plaintiffs in the actions referred to. That is the reason of the language used in the opinion of the court in *Warren* v. *Pazolt*, 203 Mass. 328, in speaking of the transaction as a loan of money upon the note. But that was said with reference merely to the note itself and its enforcement against the trust estate, and not with reference at all to the question now

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considered. Whether the trustees could be held personally liable upon the note need not be considered. See *Dunham* v. *Blood*, *ante*, 512.

We do not doubt that the bill presents a proper case for relief in equity. There needs no discussion or citation of authorities to show this. That there may have been a partial consideration for the giving of the release in the comparatively small amount paid in cash at the same time that the note for a much larger amount was delivered does not under the circumstances make it impossible to give relief. *Johnson* v. *Johnson*, 3 B. & P. 162. Nor does the bill show that it will be impossible upon rescission to put the parties *in statu quo*, as in *Clarke* v. *Dickson*, El., Bl. & El. 148. It was not necessary to offer to return the money which the plaintiff has received. What was paid at and before the giving of the release was rightly paid upon his original demand; what has been paid upon the note should in equity be applied upon the same demand. He need not go through the vain ceremony of repaying or offering to repay these sums, when it at once would become the duty of the trustees to return to him the amount of these payments with a much larger additional sum. And see *Beauchamp* v. *Winn*, L. R. 6 H. L. 223, 232; *Long* v. *Athol*, 196 Mass. 497, 506; *O'Shea* v. *Vaughn*, 201 Mass. 412, 422 *et seq.*

There is no ground upon which the demurrer can be sustained.

What has been said upon the demurrer covers most of the points that have been raised upon the merits.

Upon careful examination of the evidence, we are of opinion that all the findings of fact made by the single justice must stand. In view of the relations between the parties and the existing circumstances, we doubt whether any contrary findings could have been supported.

There is nothing in the transactions relating to the Carney building to prevent giving to the plaintiff the relief for which he asks. That was an independent matter, which has been fully heard, and it has been found that the trustees are not liable to the *cestuis que trust* by reason thereof. *Warren* v. *Pazolt*, 203 Mass. 328. Certainly we cannot hold them indirectly for what it has been held does not impose upon them any liability. Nor

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can we make the plaintiff suffer as a beneficiary for the errors of judgment in which he has shared as a trustee, but for which neither he nor the other trustees are to be held liable as trustees.

We do not deem it desirable to discuss further the considerations which have been suggested by the ingenuity of counsel. We have weighed carefully all the arguments that have been addressed to us in behalf of these defendants and have examined all the decisions to which they have referred us, although all of these have not been cited. We have found nothing to lead our minds to a different conclusion from that which we have reached, or that can prevail against the manifest equities in favor of the plaintiff. A decree must be entered for the plaintiff as prayed for, with costs against the intervening defendants.

So ordered.

WILLIAM R. LITTLEFIELD, administrator, *vs.* JOHN R. GILMAN.

Middlesex. December 6, 1910. — January 6, 1911.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Negligence, Imputed. *Automobile*. *Practice, Civil*, Exceptions, Conduct of trial: request for rulings.

Where one, while being driven in an automobile as a guest of the person driving it, received fatal injuries in a collision on a public way caused directly by the negligence of a third person, to which negligence on the part of the driver contributed, the administrator of his estate, if at the time of the collision the intestate was in the exercise of due care, may recover damages from the negligent third person for the conscious suffering of the intestate in spite of the negligence of the driver whose guest he was. Following *Shultz* v. *Old Colony Street Railway*, 193 Mass. 309.

In an action by an administrator against the driver of an automobile for the conscious suffering of the plaintiff's intestate who received fatal injuries by reason of a collision with another automobile in which the plaintiff's intestate was being driven as a guest of its driver, there was evidence that the driver of the automobile in which the plaintiff's intestate was had not secured the license to drive an automobile required by St. 1903, c. 473, §§ 4, 5. At the close of the evidence the defendant asked for the following ruling: "If the jury find that the driver was negligent in driving the automobile in which [the plaintiff's intestate] was riding, and such negligence was a contributory cause of the accident, then the plaintiff is bound by such negligence and cannot recover." The trial judge gave to the jury instructions on the subject of imputed negligence which this court held were ample and sufficient, and refused to give the ruling

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requested. The defendant alleged exceptions, and in this court relied only upon an exception to the refusal to give the ruling above quoted. *Held*, that by the exception to the refusal to give the quoted ruling, the question, whether the fact, that the driver of the automobile in which the plaintiff's intestate was being driven did not have the required license to operate an automobile, affected the right of the plaintiff to recover, was not brought before this court.

TORT by the administrator of one William H. Littlefield for the conscious suffering of the plaintiff's intestate due to fatal injuries received in a collision between an automobile, which was operated by the defendant, and one in which the plaintiff's intestate was being driven as a guest of its driver. Writ dated May 14, 1908.

In the Superior Court the case was tried before *Bond*, J. It appeared that the automobile, in which the plaintiff was, was being driven by one Murphy, who was in the employ of one Shepard, that the plaintiff's intestate "was in no way connected with Murphy as master and servant, principal and agent, parent and child, or guardian and ward," nor was he connected with the business of Shepard. There was evidence that the plaintiff's intestate was being driven in the automobile merely as the guest of Murphy.

The ruling asked for by the defendant on the question of imputed negligence is stated in the opinion. The instructions of the trial judge on that subject followed instructions as to the necessity of the plaintiff's proving that his intestate was in the exercise of due care, and were as follows:

"Now, the negligence of Murphy, who was driving that automobile in which Mr. Littlefield was riding, is not necessarily to be imputed to Mr. Littlefield; it is not the same as though Mr. Littlefield was running the automobile himself; it depends to some extent upon how he happened to be riding in the automobile. Of course if it was his automobile and Mr. Murphy was his servant and was running it under his direction, he had the control of Mr. Murphy then, and Mr. Murphy's negligence would be his negligence; but if he had no authority over Mr. Murphy, — if Mr. Murphy wasn't his servant, and he was merely riding in the automobile as Mr. Murphy's guest, invited to ride by him, then the negligence of Mr. Murphy is not to be imputed to Mr. Littlefield.

"There has been some evidence with reference to that coming

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from Mr. Murphy, and perhaps to some extent from Mr. Tierney, and possibly from Mr. Shepard — I don't remember about that, and it is for you to say whether Mr. Littlefield was invited to ride just for the pleasure of the ride by Mr. Murphy or any one else who had the right to invite him, and whether or not Mr. Littlefield had any control over Mr. Murphy. I mean by that any right to direct him what to do; whether or not Mr. Murphy was acting independently of Mr. Littlefield, and Mr. Littlefield had nothing to do with directing him how to run his automobile."

The jury found for the plaintiff in the sum of $3,500; and the defendant alleged exceptions.

J. C. Hammond, for the defendant, submitted a brief.

F. Hurtubis, Jr., for the plaintiff.

RUGG, J. This is an action of tort to recover damages for the conscious suffering of one William H. Littlefield which resulted from the collision of an automobile driven by the defendant with that operated by one Murphy. The deceased was riding with Murphy as his guest, and there was evidence from which it might have been found that the injuries were caused by the concurrent negligence of the defendant and Murphy. The latter was employed as a repair man at a garage, and although not licensed as a chauffeur was driving the automobile on the business of his employer. The only exception not now waived was to the refusal of the trial judge to rule that "If the jury find that the driver was negligent in driving the automobile in which Littlefield was riding, and such negligence was a contributory cause of the accident, then the plaintiff is bound by such negligence and cannot recover." This request is directly contrary to the law as laid down in *Shultz* v. *Old Colony Street Railway*, 193 Mass. 309, and the several cases following it to the effect that the negligence of the driver of a vehicle is not ordinarily to be imputed to one riding merely as guest, who is himself in the exercise of due care. The instructions given were clear and ample in accordance with this principle.

It is now argued in support of the exception that because St. 1903, c. 473, §§ 4, 5, required every driver for hire of an automobile to be licensed and to display a distinguishing number or mark while acting as such driver, and as Murphy had no such license, the deceased must be held as matter of law to have been

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negligent, and reliance is placed on *Dudley* v. *Northampton Street Railway*, 202 Mass. 443, and *Feeley* v. *Melrose*, 205 Mass. 329. This point was not called to the attention of the trial judge nor was it within the scope of the request presented by the defendant. The only question it fairly opened to consideration was the doctrine of imputed negligence. As to this subject the request was properly refused and accurate instructions were given.

Exceptions overruled.

RAYMOND KILEY *vs.* BOSTON ELEVATED RAILWAY COMPANY.
HENRY F. KILEY *vs.* SAME.

Suffolk. December 7, 1910. — January 6, 1911.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Negligence, Street railway, In use of highway.

In an action by a bright boy about eight years of age for injuries caused by his hand being run over by a street car which was crossing at right angles a steep street down which he was coasting at ten o'clock in the morning of a day in December, there was evidence tending to show that at the intersection of the two streets there were buildings covering all the land at the street corners so that the motorman's view as he approached the intersection of the streets was somewhat cut off, that the plaintiff was preceded down the hill by another boy coasting, who, seeing the car, turned to pass in front of it, that the motorman, seeing the first boy, to prevent running over him stopped or almost stopped his car in the middle of the street down which the plaintiff was coasting, that the plaintiff observing the movements of the boy preceding him, turned his sled to go around the rear of the car, and, because of the unexpected stopping or lessening of the speed of the car, came into collision with it so that his hand was run over by the rear wheel. *Held*, that there was no evidence of negligence on the part of the motorman.

TWO ACTIONS OF TORT, the first for personal injuries received by a minor and caused by his hand being run over by a street car of the defendant on December 15, 1906, as stated in the opinion. The second action was by the father of the plaintiff in the first action for loss of the services of his minor son and for expense of medical attendance and nursing due to the injury above mentioned. Writs dated March 9, 1907.

In the Superior Court the cases were tried together before

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Dana, J. At the close of the plaintiff's evidence the presiding judge ordered verdicts for the defendant; and the plaintiffs alleged exceptions.

The facts are stated in the opinion.

W. A. Buie, (*J. R. Murphy* with him,) for the plaintiffs.

W. G. Thompson, (*H. W. Durant* with him,) for the defendant.

RUGG, J. Raymond Kiley, hereafter referred to as the plaintiff, was at the time of his injuries, which are the subject of this action, a bright boy almost eight years old. At about ten o'clock in the forenoon of a day in December he was coasting on a single sled, lying on his stomach, on Lexington Street, in the Charlestown District. At a place where it was steep Lexington Street crossed at a right angle Bunker Hill Street, in which were double tracks of the defendant. Just before the plaintiff reached the junction of the two streets another boy on a sled came down the hill and, turning to the right as he crossed Bunker Hill Street, avoided collision with an eight wheeled car of the defendant proceeding from the left to the right side of Lexington Street on the track nearer the top of the hill. The motorman brought his car either to a stop or nearly so in order to avoid striking this boy when the front of his car was close to or a little past the middle of the street, and then immediately started forward. The plaintiff was coming down the hill about in the middle of the street. He described what occurred as follows: "Because I saw this car and I saw the other boy slew to the right . . . I thought I would get around the stern of the car so I wouldn't get hurt and I slewed against the car, and the minute I struck the car the car started up." From other evidence it appeared that it was the rear wheel of the car which ran over the plaintiff's hand. Two men standing on the forward vestibule of the car as the car had started forward after avoiding the boy who slid in front of it, saw the plaintiff coming down the hill and hastened unavailingly to prevent injury to him. There was testimony from one other witness, who was in a store, that as the car began crossing the foot of Lexington Street the plaintiff was twenty-five or thirty feet back from the cross walk, and that he did not see the other boy go in front of the car, and that the car seemed to him to slow down until it stopped after

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the injury. But in view of the testimony of the plaintiff and his other witnesses, it must be held that the other boy did go in front of the car, which slowed or stopped to let him pass and then started forward. There were buildings covering all the land at the street corners, so that the view up the hill by the motorman was to that extent cut off.

There is nothing in these facts to show any negligence of the motorman. He must necessarily keep the street in front of his moving car constantly within his view. He must also be alert at all intersecting streets to avoid collision with travellers who may be likely to come therefrom upon his tracks. But ordinarily he is not bound to be looking out for travellers who may run into the rear of his car. The establishment of such a standard of duty would prevent to a large extent the reasonably rapid carriage of passengers for which street railway corporations are chartered. This motorman had his car under control. That he stopped it to let one boy slide without injury directly in front of it shows this. He was then across the street down which there was coasting. It was his duty to move his car out of the way as quickly as possible, or it might become a menace to other travellers. Even if he had seen the plaintiff in the position, where he must have been the instant the boy, who went in front of the car, was out of danger slewing his sled so as to get around the rear of the car, it would be difficult to say that to drive the car forward was not the most careful thing to do in the light of all the conditions then surrounding him, including the observation that the plaintiff was trying to go behind the car. But for the stopping to avert collision with the boy in front, the course for the plaintiff would probably have been clear. It might well have been regarded as perilous to permit the car to remain still in the face of coasters coming down the hill with the possibilities of serious injury to them from running into a stationary car. It does not appear, however, that the motorman saw or in the exercise of reasonable care ought to have seen the plaintiff, and hence he cannot be charged with any default of duty. *Hamilton* v. *West End Street Railway*, 163 Mass. 199. *Black* v. *Boston Elevated Railway*, 187 Mass. 172. It is hardly necessary to add that these facts are wholly different from those in cases where a car is driven among coasters in

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plain sight without any reasonable effort to avoid running them down, of which *Strutzel* v. *St. Paul City Railway*, 47 Minn. 543, relied on by the plaintiff, is an example.

Judgment on the verdict in each case.

JULIA T. HALEY, administratrix, *vs.* SAMUEL LOMBARD & another.

Suffolk. December 7, 1910. — January 6, 1911.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Negligence, Employer's liability.

In an action, by the administrator of the estate of a teamster, for the conscious suffering and death of the plaintiff's intestate while in the employ of the defendant, by reason of the breaking of a strap, when the plaintiff's intestate was hauling it tight around his load with his foot braced against a wheel of his wagon, there was evidence that about a week before the accident the plaintiff's intestate showed the strap to the defendant's superintendent and called his attention to its weakness, and that the superintendent, after examining the strap, said, "That will hold all the load you ever put on your wagon." There was testimony that after the accident the plaintiff's intestate said that he supposed that the superintendent knew better about the strap than he did, and that he let it go at that. It appeared that, when the strap broke, the intestate's wagon was in a street, which adjoined a great market and was lined with teams on both sides, leaving a space for other teams to pass through in the middle, and that the plaintiff fell backward into this space and was run over by a loaded team. There was no evidence in regard to the condition of the strap at the beginning of the employment of the plaintiff's intestate. *Held*, that there was evidence of due care on the part of the plaintiff's intestate, and that the question, whether he assumed the risk of such an accident by voluntarily exposing himself to danger, was for the jury. Distinguishing *Davis* v. *Forbes*, 171 Mass. 548.

It is the duty of an employer of a teamster, in supplying him with a strap with which to bind the load on his wagon, to furnish a strap which is reasonably safe when used for the purpose intended, and, if the strap breaks while being thus used a week after its worn condition has been called to the attention of the employer's superintendent, and the teamster in consequence is injured, in an action against the employer for the injuries thus caused there is evidence of the defendant's negligence.

TORT by the administratrix of the estate of William J. Haley, late of Somerville, for the conscious suffering and death of the plaintiff's intestate, while he was in the employ of the defendants as a teamster, on August 6, 1906, on North Market Street in Boston, by reason of the breaking of a strap when the plaintiff's

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intestate was engaged in hauling it tight to buckle it around three barrels of apples on the tail board of his wagon, having his foot on "the near hind wheel to heave on the strap" and standing on the side of the wagon which was toward the middle of the street, where, when the strap broke, he fell and was run over by a team loaded with potatoes; the declaration containing counts under the employers' liability act, alleging respectively a defect in the ways, works or machinery of the defendants and negligence of a superintendent, and a count at common law for the conscious suffering, alleging negligence in furnishing the plaintiff's intestate with unsafe appliances. Writ dated December 19, 1906.

In the Superior Court the case was tried before *White*, J. The facts which could have been found upon the evidence are stated in the opinion. At the close of the plaintiff's evidence the judge ordered a verdict for the defendants; and the plaintiff alleged exceptions.

R. W. Frost, (*M. B. Breath* with him,) for the plaintiff.

T. W. Proctor, for the defendants.

RUGG, J. The plaintiff's intestate was an experienced teamster in the employ of the defendants. There was evidence from which it might have been found that about a week before his injury the plaintiff's intestate showed to a superintendent of the defendants a strap used for binding a load, calling attention to its weakness. The latter, after examination of the strap, said, "That will hold all the load you ever put on your wagon." About a week later, while the plaintiff's intestate was pulling hard to tighten the strap around his load, it broke, he fell into the street between the wheels of a passing wagon, and received fatal injuries. The street was adjacent to the great market in Boston, and was lined with teams on each side, leaving space enough between so that there was no blockade.

1. It is urged that the plaintiff's intestate was not in the exercise of due care, for the reason that he braced one foot upon the wheel of his wagon in order the better to tighten the strap around some barrels, knowing its weakened condition, and pulled upon it hard in such a position that he must have foreseen that if it gave way he would be likely to fall under the heavy wagon which he saw approaching. He had spoken of deterioration in

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the strap to his superior, who had given emphatic assurance of its strength. It does not appear that he dissented from this view or further discussed the subject, but there was testimony that after the accident he said that he supposed the superintendent knew better about it than he did, and he let it go at that. It could not have been ruled, as matter of law, in view of this testimony and his subsequent conduct, that he did not rely on this statement, and it might have been inferred that he surrendered his own opinion to that thus expressed by the representative of his employer. It was said in *Carriere* v. *Merrick Lumber Co.* 203 Mass. 322, at p. 326, that "an assurance of safety by a superintendent has usually been held to be such a consideration as to render the due care of a workman relying upon it a question of fact." While there may be exceptions to this rule, no considerations appear which take the present case out of its operation. If the deceased relied upon the assurance as to the strap given by the superintendent, then the fact that he was in such position when pulling upon it that in case it broke he might fall under passing vehicles was of slight significance. It does not appear that he could have stood in any other position and efficiently performed his work. The street was a busy one, and whether he could have waited for the heavy wagon by which he was injured to pass without encountering other dangers was one of the circumstances to be weighed by the jury.

2. Whether the deceased assumed the risk by voluntarily exposing himself to danger, after knowing the facts and having a full appreciation of their bearing upon his safety, was a question of fact. *McKinnon* v. *Riter-Conley Manuf. Co.* 186 Mass. 155. *Frost* v. *McCarthy*, 200 Mass. 445. *O'Toole* v. *Pruyn*, 201 Mass. 126. This aspect of the case is so interwoven with the inquiry as to due care in view of the assurance given by the defendants' representative touching the strength of the strap as to stand upon the same ground. The defendants strongly rely upon *Davis* v. *Forbes*, 171 Mass. 548. Without impairing the authority of that case, it is distinguishable on the ground that the plaintiff there relied upon an experiment performed in his presence to determine the soundness of the appliance, and not primarily upon the assurance given by the defendant. In *Levesque* v. *Janson*, 165 Mass. 16, there was apparently opportunity for

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selection by the plaintiff of a safe harness, and he chose to use the rotten one. Hence that case affords no support to the defendants. Cases like *Kenney* v. *Hingham Cordage Co.* 168 Mass. 278, where the risk from permanent conditions was held to have been assumed by the contract of employment, have no bearing, because there was no evidence to show the condition of the strap at the beginning of the employment of the plaintiff's intestate, and because it might have been inferred that this worn condition did not manifest itself until about the time when notice was given to the defendants' superintendent.

3. It was the duty of the defendants to furnish reasonably safe appliances. The fact that this strap broke, coupled with evidence that its worn condition had been especially called to the attention of the representative of the defendants, was sufficient to make improper a ruling as matter of law that the defendants were not negligent. *Burgess* v. *Davis Sulphur Ore Co.* 165 Mass. 71. *Shannon* v. *Willard*, 201 Mass. 377. Whether the use being made of the strap at the time it gave way was within the line of duty of the deceased was for the jury. Hard pulling in order to tighten the binding of a load of barrels might have been found to be necessary.

Exceptions sustained.

JENETTA CRAIG *vs.* BOSTON ELEVATED RAILWAY COMPANY.
GEORGE W. CRAIG, administrator, *vs.* SAME.

Suffolk. December 8, 1910. — January 6, 1911.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Negligence, Street railway.

At the trial of an action against a street railway company by a woman, who as she was about to take a seat in a closed electric car of the defendant was thrown to one side upon another passenger by an alleged sudden starting and jerking of the car, the plaintiff and two other witnesses testified for the plaintiff. The plaintiff testified that as she was facing toward the side of the car and was in the act of sitting down, she first was thrown forward with a sudden jerk and then jerked back and that one of her companions, another witness, who was standing, was not thrown but would have been if she had not been holding on to a strap. The companion referred to testified that the accident happened at 11.30 in the evening and

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that people were going home from the theatre, that there were a number of jerks of the car near together violent enough to take one off one's feet, but that she was not taken off her feet because she recovered herself by taking hold of a strap. The third witness, another companion of the plaintiff, similarly described the movements of the car and testified that she saved herself from being thrown by taking hold of the door frame. *Held*, following *McGann* v. *Boston Elevated Railway*, 199 Mass. 446, that there was no evidence of so unusual a movement of the car as to warrant a finding that the motorman was negligent.

A constant stopping and starting of an electric street car with a jerky movement to avoid collisions with persons, vehicles and cars as the car passes along a public street in front of a theatre from which crowds are emerging after an evening performance does not in itself constitute evidence of negligence on the part of the motorman.

TWO ACTIONS OF TORT, the first for injuries alleged to have been received by reason of the jerking and sudden starting of a closed electric car upon which the plaintiff was about to take a seat, as stated in the opinion. The second action originally was by the husband of the plaintiff in the first action and was for loss of consortium and expenses to which the husband was put because of the injuries to his wife. The husband died during the pendency of the actions, and the second action was prosecuted by the administrator of his estate, the claim for damages due to loss of consortium being waived. Writs dated November 26, 1906.

In the Superior Court the cases were tried together before *Wait*, J. The facts are stated in the opinion. At the close of the plaintiff's evidence the presiding judge ordered a verdict for the defendant; and the plaintiffs alleged exceptions.

C. S. Tilden, for the plaintiffs.

J. T. Hughes, for the defendant.

LORING, J. The plaintiff in the first action (a woman sixty-seven years of age) had been to the theatre in company with her own daughter, a Mrs. Goodwin and Mrs. Goodwin's daughter. After the theatre they waited for a car at the corner of Washington and Boylston Streets. The car stopped. The plaintiff entered first, followed by Mrs. Goodwin, then by Mrs. Goodwin's daughter, and lastly by her own daughter. The plaintiff, her own daughter and Mrs. Goodwin testified at the trial; Mrs. Goodwin's daughter did not. The plaintiff's story was that she went to the forward end of the car because there was but one vacant seat at the rear. To quote her own words, "She was in the act of sitting down when the car gave a sudden jerk and

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threw her forward. She thought she was facing toward the side of the car at the time. She was just in the act of sitting down. She was thrown forward, first with a sudden jerk, and then jerked back, and fell, she thought on Mrs. Goodwin, . . . who had followed her into the car. When she sat down her left knee began to pain, and as a result of what happened, she suffered from pain and has a weakness in the leg." The plaintiff further testified that Mrs. Goodwin was not thrown down, but "if she hadn't been holding on to a strap, she would have gone down too," and that no one else in the car was thrown over. Mrs. Goodwin testified that there were a number of jerks near together and "violent enough to take you off your feet," but that they did not take her off her feet; that the sudden jerks threw the plaintiff off her feet into a passenger's lap, and "jerked me some, but I recovered myself by taking hold of the strap." The plaintiff's daughter testified that "the car started and then stopped, not a dead stop, and then started again"; that one motion followed the other suddenly, and that the car went "a very, very little distance" on the first start before it stopped again. That she had to support herself "by taking hold of the door frame, or it would throw me in the car." That she did not see her mother thrown and could not do so, being behind Mrs. Goodwin and her daughter. The testimony showed that all four were safely seated, that no other persons boarded the car at the time, and that those previously in the car were seated.

We are of opinion that the evidence did not go far enough to warrant a finding that the motorman was negligent, and that the case comes within *McGann* v. *Boston Elevated Railway*, 199 Mass. 446. A jerk such as is usual might well throw a passenger "just in the act of sitting down" into the lap of a passenger next to her if the passenger was not prepared for it, and a person might well take hold of a door frame to steady himself in such a case. In *Byron* v. *Lynn & Boston Railroad*, 177 Mass. 303, one of the witnesses testified that the motion of the car there in question "knocked me over, my hand against the sash of the window. I came near falling over the lady I had given my seat to." In spite of that it was held in that case that the evidence did not go far enough to warrant a finding that the motorman was negligent.

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Mrs. Goodwin's testimony gave the explanation of the series of jerks. She testified "that it was eleven-thirty and people were going home from the theatre." If the constant stopping and starting was to avoid collision with persons or carriages crossing ahead of the car, or because of cars ahead of it, there was no negligence on the part of the motorman. See in this connection *Timms* v. *Old Colony Street Railway*, 183 Mass. 193, 194, and *McGann* v. *Boston Elevated Railway*, 199 Mass. 446, 449.

Exceptions overruled.

CATHERINE M. McCARTHY *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Middlesex. December 8, 1910. — January 6, 1911.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Negligence, Street railway.

At the trial of an action by a woman against a street railway company to recover for injuries alleged to have been caused to the plaintiff by her having been thrown down by the stopping with an unwarranted jerk of a car of the defendant which she was about to leave, there was testimony by witnesses of the plaintiff tending to show that she signalled the conductor to stop the car and rose and stood in the aisle grasping with a firm hold handles on the ends of seats on each side of the aisle running at right angles to the aisle, that the car did not stop at the place intended, that the conductor thereupon gave another signal to the motorman, that the car then stopped so suddenly as to break the plaintiff's hold upon the handles and to throw her to the floor of the car. The conductor testified that, before reaching the stopping place where the plaintiff desired to leave the car, the motorman lessened the speed of the car to cross some switches, then applied the power and started forward and, upon receiving the conductor's second signal, applied air brakes too quickly. *Held*, that there was evidence warranting a finding that the motorman was negligent in the operation of the car.

TORT for injuries alleged to have been received, while the plaintiff was a passenger upon a closed electric car of the defendant, by an unwarrantably sudden stopping of the car as stated in the opinion. Writ dated February 18, 1908.

In the Superior Court the case was tried before *Morton*, J. The material facts are stated in the opinion.

At the close of the evidence the defendant asked the presid-

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ing judge to rule that on all the evidence the plaintiff could not recover and that there was "no evidence of negligence on the part of the defendant with reference to the operation of the car." The judge refused so to rule. The jury found for the plaintiff; and the defendant alleged exceptions.

H. D. McLellan, for the defendant.

R. H. Sherman, for the plaintiff.

LORING, J. The plaintiff in this case was a passenger in a long car with side seats at each end and cross seats with sliding backs in the centre. She testified that she was sitting on the last cross seat with one Callahan. As the car was nearing the crossing where she had asked the conductor to stop she got up, took hold of the handles in the upper corner of each of the two rear seats and stood in the aisle waiting for the car to stop, but the car did not stop. Then the conductor "gave another quick bell," saying in a disturbed tone, "What is the matter with that fellow?" Thereupon, to quote the plaintiff's words, "the car came to a terrible stop"; the stop "was an unusual stop; I never saw one like it . . . in its violence." "I was thrown on the ground, on my back." She testified that she "had quite a firm hold" of the two handles, and that she knew of the signs in the defendant's cars asking passengers to "Please be at the door when nearing your stop." This story was corroborated by Callahan. Callahan also testified that he stepped into the aisle to let the plaintiff, who was sitting next the window, pass out; that he took hold of the handle of the seat next in front of the seat on which he and the plaintiff had been sitting, and that he "was thrown backward like that against the side of the seat" by the abrupt stop, and the seat back, of which he had hold, slid forward. The conductor was called as a witness by the defendant. He testified that the plaintiff was standing in the vestibule when the car stopped and that she was thrown against the end of the car, that she "started to swing around" and that he "caught her arm and held her. I wasn't staggered at all, because I was used to the cars, and wasn't thrown at all." The conductor added that the motorman slowed down the car as it went over some switches and connections just before the plaintiff's stopping place, and then in place of bringing the car to a stop to let the plaintiff off he put on the power and started

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ahead whereupon he "gave another bell" and the motorman put on too much air or put it on too fast and "brought up kind of abrupt."

We do not mean to intimate that the story of Callahan and the plaintiff taken alone would not have brought this case within *Lacour* v. *Springfield Street Railway*, 200 Mass. 34, *Black* v. *Boston Elevated Railway*, 206 Mass. 80, and *Work* v. *Boston Elevated Railway*, *ante*, 447, nor that the conductor's testimony taken alone would not have brought it within *Cutts* v. *Boston Elevated Railway*, 202 Mass. 450. Upon those points it is not necessary to express an opinion for when the two are taken together there was without question evidence which warranted a finding that the motorman was negligent in the way he brought the car to a stop, and the case comes with the class of cases like *Work* v. *Boston Elevated Railway*, *ante*, 447.

Exceptions overruled.

FRANCES A. BRISBIN *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Middlesex. December 8, 1910. — January 6, 1911.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Negligence, Street railway, Elevated railway.

In an action against an elevated railway company, which operated and maintained an elevated station and also street railway lines and caused certain street railway cars to enter the station at the elevated level, for injuries received by a woman who in attempting to enter a surface car on the elevated level stepped into a space between the platform and the entrance step of the car, there was evidence tending to show that the defendant had made provision for two closed surface cars to enter the station upon a certain track, discharge their passengers by their front doors, and receive new passengers by their rear doors, that the platform furnished by the defendant was ample for the accommodation of two such cars, but that beyond the point where the rear of the second car properly would stand, the platform terminated with a curved end having a radius of about twenty-four inches; that the car which the plaintiff attempted to enter did not stop at the place provided for it but did stop with its rear step, which was about thirty-six inches long, so placed that only about eight inches of the forward part of it was opposite the straight edge of the platform and the platform curved away from the rest of the step with the curve above described. There also was evidence tending to show that the plaintiff was familiar with the station and

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the customs as to its use, and that she noticed that the car in question had not come up to its regular stopping place, that when she attempted to enter the car she was preceded by a crowd who entered safely, and that owing to the compactness of the crowd she did not look down and did not know of the position of the step. It was not clear whether she stepped off the end of the platform or between the curving part of the platform and the step of the car. *Held*, that there was evidence for the jury of due care on the part of the plaintiff, and also of negligence on the part of the defendant in failing to bring the car wholly along side of the straight portion of the platform before the passengers were allowed to enter.

TORT for injuries received by the plaintiff at the Sullivan Square station of the defendant in Boston from stepping off the platform between it and the step of a surface car on the elevated structure which she was attempting to enter. Writ dated February 25, 1908.

In the Superior Court the case was tried before *Sherman*, J. At the close of the plaintiff's evidence the defendant rested and asked that a verdict be ordered for the defendant. The trial judge stated that he was of the opinion that there was evidence for the jury on the questions involved in the case. At the suggestion of the judge, however, a verdict for the defendant was ordered subject to an exception by the plaintiff, the parties agreeing that if the plaintiff's exception was sustained judgment should be entered for the plaintiff in the sum of $500.

L. S. Thierry, for the plaintiff.

H. D. McLellan, for the defendant.

RUGG, J. The plaintiff was rightfully in the upper level of the Sullivan Square station of the defendant awaiting one of its cars bound for Medford Hillside. This car arrived and departed on the same track, the rear of the car as it came in being the front as it went out. The platform, alongside which this car came, was of ample length as a stand for two cars without either being opposite its curve. It was straight, except that its outward end was the arc of a circle, whose radius was twenty-three and one fourth inches. It was therefore forty-six and one half inches wide as it began to grow narrower. The custom of the defendant was to receive passengers into a car at this platform by the rear door as it came in. The place was light, and the plaintiff was one of a considerable number waiting. She was familiar with the station and the customs as to its use. As the Medford Hillside car came into the station, instead of moving

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along the platform far enough so that its entire length, including its rear step, would be opposite the straight part of the platform, it stopped so that of the rear step (which was about three or three and one half feet in length) only about eight inches was opposite the straight part of the platform. The result was that only eight inches of the car-step was adjacent to the station platform, and for its remaining two feet or more the platform curved away regularly from substantially nothing to twenty-three and one fourth inches, and its extreme end was at or near the end of the step. According to the custom of the defendant, passengers were expected to board the car when it had come to a stop in this position. The plaintiff noticed that the car did not come up to its proper place, but she went to it immediately and tried to get on, and fell off the platform and received injury, to recover for which this action is brought. The plaintiff testified that there was "quite a crowd in front" of her, and that "there were people ahead of me, of course, so that I could not see the platform," and that she was not thinking of the end of the platform at all and did not look down to observe her footing, and "was aiming to get into the car," and to the question, "If you had looked down could you have seen that there was a place there that you would fall off" answered, "If I had tried to peek around through the crowd I might possibly have seen it." The station was in the control of the defendant, both as to construction and management. It might have been found to be negligent in failing to bring its car wholly along side its platform as usual where access would be without danger.

Although the question of the plaintiff's due care is close, we incline to the opinion that it was for the jury. The evidence appears open to the construction that while the plaintiff was walking upon a platform less than four feet wide toward the car in the ordinary way with a crowd, which prevented her convenient view of the platform, and which may have somewhat impelled her movement involuntarily, and was in the act of getting toward the car door, she suddenly found herself over the edge of the platform at or near its end. It is not certain from the evidence whether she fell off the end of the platform or ir the space between it and the car, which for some distance may have been found to have been eighteen inches or more in width.

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Her eyes might have been found to be fixed on the car door all the time until the fall. By an unusual and negligent act of the defendant, the place where the plaintiff must go was perilously near the end of the platform, and the distance from the platform to the car step, which should have been and usually was uniform and reasonably short, was increased for a large part of its width so much as to require observation to avoid risk of injury. Yet people in front of her appeared to be passing in safety into the car. Commonly no particular circumspection was required. These circumstances may have been found to relieve the plaintiff of the obligation to exercise the closest scrutiny, and to warrant a finding that the reasonable conduct of an ordinarily prudent person did not require her so to look as to discover the danger. This case falls within the rule laid down in *Plummer* v. *Boston Elevated Railway*, 198 Mass. 499, at 508 and 509. *Anshen* v. *Boston Elevated Railway*, 205 Mass. 32.

In accordance with agreement of the parties let the entry be

Judgment for the plaintiff in the sum of $500.

SAMUEL A. COHEN *vs.* ANTONIO LONGARINI.

Suffolk. December 9, 1910. — January 6, 1911.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Practice, Civil, Exceptions. *Conversion. Evidence,* Presumptions and burden of proof.

An exception to the refusal of a presiding judge to rule, that the plaintiff in an action of tort for an alleged conversion is entitled to recover the amount claimed in his declaration, cannot be sustained where the bill of exceptions does not purport to state all the material evidence.

At the trial of an action of tort against a constable for the alleged conversion of goods in a store, which the defendant attached as the property of one S., if the plaintiff testifies that the goods belonged and still belong to him, that he made a conditional sale of them to S. by the terms of which the title to the goods was to remain in the plaintiff until payment was made, that the plaintiff executed an absolute bill of sale to S. and placed it in escrow to be delivered when full payment had been made, that S. entered into possession of the store and conducted the business, that later the plaintiff took possession of the store and the goods in it for a breach of a condition of the sale and employed S. as his agent to run

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the store thereafter, and that the plaintiff did not appear there himself except at rare intervals, and if the plaintiff admits that he had sold the store and there is testimony that S. had asserted that he was the proprietor of it, and S. himself admits that he was indebted to various New York firms and was a bankrupt, that he came to Boston at about the time he entered into possession of the store and that he was an entire stranger to the plaintiff, and if it appears that during the whole of the period under inquiry the business was conducted under an impersonal name which remained unchanged, this evidence would warrant a finding that the dealing of S. with the store as its owner represented his true relation to it, and accordingly the presiding judge should refuse to order a verdict for the plaintiff and should submit to the jury the question whether the plaintiff has sustained the burden of proof in showing that he was the owner of the goods at the time of their attachment as the goods of S.

TORT for the alleged conversion of two hundred and seven pairs of shoes of the value of $396.20, which the defendant as a constable attached as the property of one Henry Siegel. Writ in the Municipal Court of the City of Boston dated March 4, 1909.

On appeal to the Superior Court the case was tried before *DeCourcy*, J. The evidence is described in the opinion. At the close of the evidence the plaintiff asked the judge to rule that on all the evidence the plaintiff was entitled to recover the amount claimed in his declaration. The judge refused to make this ruling, and submitted the case to the jury "with full instructions" to which no exception was taken. The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

W. Charak, for the plaintiff.

W. M. Blatt, for the defendant.

RUGG, J. This is an action for the conversion of certain property alleged to belong to the plaintiff. At the close of the evidence the plaintiff asked the judge to rule that he was entitled to recover. His exception to the refusal to grant this prayer presents the only question to be determined. A brief answer to the plaintiff's contention is that the bill of exceptions does not purport to report all the material evidence. Hence it does not appear that any harm has been done to him or any error committed. But as neither party has argued this point, we consider the case in another aspect.

It was not disputed that on August 26, 1908, the plaintiff purchased from one who had been his partner the latter's inter-

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est in a shoe store, which the two had before conducted as co partners. The plaintiff testified that on the day following he made an agreement of conditional sale of this store and all its stock with one Siegel, the price being $3,439, of which the receipt of $1,000 was acknowledged, the title to remain in the plaintiff until payment was made, and that contemporaneously he executed an absolute bill of sale to Siegel, and placed it in escrow to be delivered when full payment had been made; that thereupon Siegel entered into possession of the store and conducted the business, having the right to make sales in the ordinary course of trade; that in February, 1909, for breach of the agreement the plaintiff took possession of the store and employed Siegel as his agent to run the store thereafter; that except at rare intervals after the conditional sale the plaintiff was not at the store, and Siegel was apparently in sole control; and that on March 4, 1909, the defendant attached goods in the store as the property of Siegel. Several witnesses testified to seeing the plaintiff take possession of the store in February, and the agreements and bill of sale were offered in evidence. The plaintiff made a perfect case on paper. But the defendant contended that it was a fraud, and that the goods attached were in truth the property of Siegel. The question at issue was, not, as contended by the plaintiff, whether the goods were liable to attachment, but whether the defendant had converted goods which were the property of the plaintiff. The plaintiff alleged that he was the owner. The burden was on him to prove that fact. It was an affirmative proposition, and could not have been ruled as matter of law upon disputed evidence. That the plaintiff once owned the property was not decisive, nor did it shift the burden of proof. He still had the burden of proving by a preponderance of all the credible evidence that he was the owner at the time of the attachment. *Phelps* v. *Cutler*, 4 Gray, 137. *Wylie* v. *Marinofsky*, 201 Mass. 583. The jury may have disbelieved all the material parts of the plaintiff's evidence. *Lindenbaum* v. *New York, New Haven, & Hartford Railroad*, 197 Mass. 314. But there was direct evidence tending to contradict the claim of the plaintiff on this point. The plaintiff admitted that he had stated that he had sold the store. There was testimony that Siegel had asserted that he was proprietor of it. He admitted that he was

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indebted to various New York firms and was a bankrupt and came to Boston at about the time he entered into possession of the store, and was an entire stranger to the plaintiff. No corroborating evidence of check, deposit slip in bank or otherwise was offered to support the oral testimony that only $1,000 was paid in August. The business was conducted under an impersonal name, which remained the same during the entire period under inquiry. The terms of the alleged conditional sale agreement might have been found to afford intrinsic indications of improbability so great as to amount to a badge of fraud. The circumstances were such as to warrant a finding that the mode of dealing with the store by Siegel as its owner represented his real relation to it. *Raymond* v. *Worcester*, 172 Mass. 205.

Exceptions overruled.

MABEL S. McCUMBER *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. December 9, 1910. — January 6, 1911.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Negligence, Street railway. *Street Railway.*

A woman, who voluntarily becomes a passenger upon a street car so crowded that she knows that she cannot get a seat and may be obliged to stand in the vestibule, assumes whatever obligation and risk are incident to the crowded condition of the car.

In the present state of transportation facilities it is not negligence for a corporation operating a street railway to permit passengers to come upon its cars when they already are crowded.

In an action, by a woman against a corporation operating a street railway, for personal injuries caused by being pushed by a stream of alighting passengers from the rear platform of a crowded car of the defendant on which the plaintiff was a passenger, if it appears by the plaintiff's testimony that the car was excessively crowded and that the plaintiff was standing in the doorway between the body of the car and the vestibule with one foot in the doorway and the other in the vestibule, that she knew by the ringing of the bell and the diminishing speed of the car that persons inside were intending to get out, that she saw them begin to push their way to the door or move down the car "as they always do," and that the conductor, who was standing inside the car collecting fares near the plaintiff, told the plaintiff that she was blocking the passageway and that she must make room for the other passengers to alight, that she tried to push

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back into the vestibule, but that it was so crowded that there was no room for her there, that persons on the step and a man beside her got off and left a narrow passageway, and that while she was turning around and trying to see what she could do the crowd surged against her, and she felt herself going off the car, there is no evidence for the jury of negligence on the part of the defendant.

In an action, by a woman against a corporation operating a street railway, for personal injuries caused by being pushed by a stream of alighting passengers from the rear platform of a crowded car of the defendant on which the plaintiff was a passenger, where it appears that the plaintiff was standing directly in the doorway between the body of the car and the vestibule through which the passengers were obliged to pass in alighting, so that the other passengers could not pass unless she moved, and that the conductor told her that she was blocking the passageway and must make room, it is proper for the presiding judge to refuse to permit the plaintiff to testify that the tone of voice in which the conductor told her that she was blocking the passageway and asked her to move was harsh and loud, and caused her to be agitated and mentally disturbed, because perturbation of mind produced solely by the inflection of a voice in the course of necessary speech, unaccompanied by threat of speech or gesture, is not an element of liability.

TORT for personal injuries alleged to have been sustained by the plaintiff while a passenger on a closed surface car of the defendant on December 19, 1905, on Huntington Avenue in Boston near its junction with Massachusetts Avenue, by reason of the excessive overcrowding of the car permitted by the servants of the defendant and the entrance and exit of passengers to and from the car while in its greatly overcrowded condition, whereby the plaintiff was forced from the car and caused to fall to the ground. Writ dated March 16, 1906.

In the Superior Court the case was tried before *Harris*, J. The plaintiff appears to have been the only witness. The defendant admitted that, on the day of this accident and on other days before and since, the passengers on this line of cars, as well as on other lines of cars and as well as on this particular car, had crowded into platforms and had been transported there in large numbers.

"The jury had a view." The record does not state whether the view was of the place of the accident or of the car on which it occurred or of both.

The judge instructed the jury as follows: "The contention is, of course, that this was a crowded car, and by the movement of the passengers the plaintiff was perhaps forced off the car, or slipped, or anyway was forced. I do not understand it to be the law yet that it is negligence to have a crowded car. It is one of

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the incidents of our American methods of travel that when we go into a crowd, which crowd is not one which is disorderly and turbulent — I mean behaving in any unusual way — we all have to take those things into account, and, so long as it is not negligent to carry a crowd, and nothing happens except one of those things which is a very natural and ordinary incident to being in a crowd, it does not lay the foundation for an action of damages."

The judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

C. E. Tupper, (*A. F. Tupper* with him,) for the plaintiff.

W. G. Thompson, (*G. E. Kimball & F. D. Putnam* with him,) for the defendant.

RUGG, J. The plaintiff with a dress suit case in her hand became a passenger on one of the defendant's closed surface cars after dark on a December day. When she boarded the car she perceived that it was crowded, and she was able to get only to the door leading from the vestibule to the aisle. Later she gave way for the conductor to go inside to collect fares, and thereafter she stood just in the doorway, with one foot in the doorway and the other in the vestibule. After one stop, at which other passengers came upon the car, the plaintiff knew by a bell and the slowing of the car that persons inside were intending to get out, and she saw them begin to push their way to the door or move down the car "as they always do." The conductor, who was near the plaintiff, but inside the car collecting fares, told her she was blocking the passageway, and that she must make room for the other passengers to alight. There was some conflict in the plaintiff's testimony after this point. She said she tried to push back into the vestibule, but it was so crowded there was no room for her there, that people on the step and a gentleman beside her got off and left a narrow passageway, and while she was turning around and trying to see what she could do the crowd surged against her, and she felt herself going off. In answer to the question, "How did you expect those people, who wanted to get off that car . . . at that stop, could get by you, standing, filling up that door," she testified "That was the conundrum." Other portions of her testimony tend to show that she thought other men would get off the vestibule or that the

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conductor would make room for her by compelling persons to move up inside the door. It is impossible to understand how she could have reasonably entertained the latter opinion, in view of her own observation as to the number of people there.

The plaintiff voluntarily and intelligently became a passenger upon a car so crowded that she could not get a seat, and knew that perhaps she might be obliged to stand in the vestibule. This was not negligence on her part, but by doing so she assumed whatever obligation or risk was incident to that condition. One of these might be to alight temporarily in order to enable other passengers to leave the car. It is not negligence on the part of a carrier in the present state of transportation to permit passengers to come upon cars which are already crowded. *Jacobs* v. *West End Street Railway*, 178 Mass. 116. *Tompkins* v. *Boston Elevated Railway*, 201 Mass. 114. It was the duty of the defendant to exercise the highest degree of care toward the plaintiff as its passenger, which was consistent with its equal duty to all its other passengers of transporting them and affording them a reasonable opportunity to alight at the end of their journey. It owed the plaintiff no higher or more exclusive duty than it owed each one of its other passengers on the car. There is nothing in the evidence to indicate that the passengers inside the car were turbulent or disorderly in any respect. They were simply trying to move to the door in the ordinary way in order to get off the car. It is plain from the testimony of the plaintiff that the narrow door of the car was completely obstructed by her person, and that other passengers could not pass unless she moved. The conductor in the performance of what appears to have been his obvious duty to other passengers told the plaintiff she was blocking the passageway, and that she must make room. In this respect he did not fail in his duty to the plaintiff. The plaintiff does not show any conduct on the part of other passengers which would naturally have caused a careful conductor to apprehend violence or disorder on their part or disregard by them of the rights of the plaintiff as a fellow passenger. That there was some pushing in the effort to pass the plaintiff is not significant. It is only when done in a disorderly way that it becomes of consequence. Hence there was no evidence of negligence on the part of the defendant. The case is fully cov-

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ered in principle by *Jacobs* v. *West End Street Railway*, 178 Mass. 116. *Treat* v. *Boston & Lowell Railroad*, 181 Mass. 371, *Kuhlen* v. *Boston & Northern Street Railway*, 193 Mass. 341, and *Beverley* v. *Boston Elevated Railway*, 194 Mass. 450, are distinguishable in that they relate to failure to properly control crowds of people under circumstances such that the carrier ought reasonably, in the exercise of the high degree of care required of it, to have anticipated violence.

Exception was taken to the refusal of the trial court to permit the plaintiff to testify that the tone of voice in which the conductor told her she was blocking the passageway and asked her to move was harsh and loud with the result that she was agitated and mentally disturbed. The language used was proper in form and substance and in the performance of duty. It was unaccompanied by threat of speech or gesture. Perturbation of mind which inevitably depends upon individual peculiarities of experience, sensitiveness and nervousness, and fluctuates in the same person with varying conditions of health and happiness, and which is attributed solely to the inflection of voice in the course of necessary speech, is too unstable a foundation upon which to rest a standard of legal liability in a case of this kind. See *Beal* v. *Lowell & Dracut Street Railway*, 157 Mass. 444.

Exceptions overruled.

COMMONWEALTH *vs.* CHARLES S. STUART & others.

Suffolk. November 14, 1910. — January 7, 1911.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Conspiracy. Evidence, Declarations of deceased persons, Of other crimes, Extrinsic affecting writings. *Practice, Criminal,* Order of evidence, Exceptions. *Larceny.*

Upon the trial of an indictment of a number of defendants for a conspiracy to steal the property of divers persons, there was proved a conspiracy in the first place to lure the owners of small stores or business enterprises into parting with their property in exchange for worthless promises backed by equally worthless security, and then, after the sellers thus had been cheated, to keep them at peace and inactive until the booty acquired from them had been disposed of and the conspirators thus had been enabled to enjoy the fruits of their unlawful enter-

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prise. A certain statement of one of the conspirators, who was indicted but who died before the trial, was admitted in evidence. The statement tended to show fraud on the part of the principal conspirator and was made to the witness, who was one of the persons defrauded, after the witness had transferred his store to the conspirator who made the statement to him. The principal conspirator objected to this statement being used against him on the ground that it had been made by the deceased conspirator after the transaction between him and the defrauded witness had been completed and the object of the conspiracy as to the witness had been attained. *Held*, that an exception founded on this objection must be overruled, because the acts of conspiracy continued as stated above after the property had been acquired.

Cases cited by SHELDON, J., upon the point, that at the trial of an indictment of a number of persons for a conspiracy to obtain property by fraud, the declarations of one of the conspirators are admissible against the others not present when they were made, although such declarations were made after the paramount object of the conspiracy had been attained by the fraudulent acquisition of the property, if they relate to the concealment and safe disposal of the property thus fraudulently obtained.

Whether the provision of R. L. c. 175, § 66, that a declaration of a deceased person shall not be excluded as hearsay if a trial judge finds it to have been made under the conditions required by that section, is applicable to criminal proceedings, here was mentioned as a question which had been referred to in argument but which was not presented for decision.

At the trial of an indictment of a number of persons for a conspiracy to obtain property by fraud, evidence of acts of one of the conspirators, which tend to show the intent with which he acted and the scope and character of the conspiracy into which he had entered and in furtherance of which those particular acts could be found to have been committed, is competent, and is not to be excluded because incidentally it tends to show the commission by this conspirator of other specific crimes.

At the trial of an indictment of a number of persons for a conspiracy to obtain property by fraud, evidence of the acts of persons, who are shown to have joined in the conspiracy, done in furtherance of its unlawful objects is admissible against their co-conspirators, although some of the persons who did the acts were not included in the indictment.

At the trial of an indictment of a number of persons for a conspiracy to obtain property by fraud, members of the conspiracy are competent witnesses for the Commonwealth against their co-conspirators.

If a witness testifies that certain land, of which a conveyance was obtained by fraud, was in a certain town, this is not testifying to the contents of the deed by which it was conveyed.

At the trial of an indictment of a number of persons for a conspiracy to obtain property by fraud, where the indictment charges that the defendants conspired together on a certain day in January, 1905, and a conspiracy is proved which began as early as 1901 and continued, with the addition of some new confederates, into the year 1906, fraudulent acts in furtherance of the conspiracy committed by its members in 1903 may be shown, the conspiracy being a continuing one.

The order of evidence is a matter wholly within the discretion of the presiding judge at a criminal trial as well as at a civil one, and no exception lies to the admission of any material evidence on the ground that it is offered for the first time upon the re-direct examination of a witness.

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At the trial of an indictment of a number of persons for a conspiracy to obtain money by fraud, the ordinary doctrine, that false statements about the value of property by one offering it for sale or exchange are mere dealer's talk, has no application to false statements fraudulently made by one of the conspirators to a victim toward whom it could be found that he stood in a confidential relation.

A conspiracy for the attainment of an unlawful end is none the less a criminal offense because some of the means employed, although essentially dishonest, could not by themselves be made the subject of a criminal prosecution.

At the trial of an indictment of a number of persons for a conspiracy to obtain property by fraud, where the conspiracy, although charged by the indictment to have existed on a certain day, was shown by the evidence to have been a continuing conspiracy extending over a period of five years, the Commonwealth may show the whole history of the conspiracy from its beginning to its consummation, including the preparations for the conspiracy made by the chief conspirator.

Under R. L. c. 208, § 26, an indictment for larceny of the property of a certain person may be sustained by showing that the defendant obtained money from the alleged victim in payment for a supposed half interest in another person's pretended business by means of false representations as to the extent and profits of the business, especially where this is shown to have been done as part of a general scheme to defraud.

Where, in carrying out an unlawful conspiracy for obtaining property by fraud, the conspirators incidentally commit other crimes, the indictable offense of conspiracy is not merged in the subsequent specific crimes, although these may be felonies while conspiracy is only a misdemeanor.

INDICTMENT, found and returned on August 10, 1907, originally in fourteen counts, charging in the first count that Charles S. Stuart and twelve other defendants named had joined in a general conspiracy to steal the property of divers persons, and in the other counts charging them with the larceny of certain property of the persons therein named.

The case was tried before *Bond*, J. Before the jury were impanelled the defendant Charles S. Stuart filed a motion to quash the indictment. Thereupon the district attorney *nol prossed* all the counts except the first and the tenth, and the judge denied the defendant Charles S. Stuart's motion to quash, subject to that defendant's exception.

The case then went to trial against the defendant Charles S. Stuart and certain others of the defendants upon the first and the tenth counts.

The first count alleged that the defendants "on the tenth day of January in the year of our Lord one thousand hine hundred and five, at Boston aforesaid, conspired together to steal the property, moneys, goods and chattels of divers persons whose

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names and a more particular description of whom are to said grand jurors unknown."

The tenth count alleged that the defendants "on the ninth day of October in the year of our Lord one thousand nine hundred and six at Boston aforesaid, money of the amount and of the value in all of one hundred dollars, of the property, goods and chattels of one Chester B. Turner in his possession then and there being, did then and there feloniously steal, take and carry away."

The jury returned a verdict of guilty on the first count against the defendant Charles S. Stuart and all the other defendants that were being tried except two, and on the tenth count returned a verdict of guilty against the defendant Charles S. Stuart and one other defendant, William A. Sweatt. The defendant Charles S. Stuart alone alleged exceptions, raising certain questions, of which those that were argued are stated in the opinion.

T. W. Proctor, for the defendant Charles S. Stuart.

M. J. Dwyer, Assistant District Attorney, for the Commonwealth.

SHELDON, J. 1. As the district attorney entered a *nol pros* upon all but the first and tenth counts of the indictment, the defendant's motion to quash has not been argued, and need not be considered.

Several exceptions were taken by this defendant to the admission of evidence. We discuss those which have been argued by his counsel.

2. The government contended that one White, the owner of a small grocery, had been induced to sell his store and business to Gaffney, one of the conspirators, and to take as security for the price thereof a second mortgage upon property in Holliston, which was represented to be of abundant value for that purpose, but which the government contended was worthless. White was permitted against the exception of the defendant to testify that after he had transferred his store to Gaffney and while Gaffney was still in possession thereof, he had a conversation with Gaffney, in which the latter said that he never had seen the Holliston property, that he had got it from Stuart, and could not tell anything about it except that it was in Holliston. There was evidence to show the existence of the conspiracy charged in

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the first count of the indictment, and that both Stuart and Gaffney, as well as others, were parties thereto.

The defendant concedes that the acts and declarations of one conspirator, made in pursuance of the common object while the conspiracy is still pending, may be proved against all the conspirators; but he contends that this evidence was incompetent because the statements were made by Gaffney after the transaction with White had been completed, when the object of the conspiracy had been attained as to him, and so that they were the mere declarations of one conspirator, not a party to the trial (Gaffney, though indicted, had died before the trial took place), and were narrative statements of past events and not in any way relevant against the defendant. 1 Greenl. on Ev. § 111. Stephen's Digest of the Law of Evidence, art. 4. But this contention is based upon too narrow a view of the scope of the conspiracy which was claimed by the government and which the evidence tended to show. Its object was not simply to lure the owners of small stores or business enterprises into parting with their property in exchange for a worthless promise backed by equally worthless security; it was part of the scheme also, after the vendors had been thus cheated, to keep them at peace and inactive until the booty acquired from them had been disposed of and the conspirators had been thus enabled to enjoy the fruits of their unlawful enterprise. All the statements of Gaffney, the admission of which was excepted to, could be found to have been made while the conspiracy was still pending and in furtherance of its criminal object. Accordingly the evidence was competent. *Commonwealth* v. *Clancy*, 187 Mass. 191, 196. *Commonwealth* v. *Waterman*, 122 Mass. 43. *Commonwealth* v. *Brown*, 14 Gray, 419.

Even if the declarations had been made after the paramount object of the conspiracy had been attained, and had related merely to the concealment and safe disposal of the property which had been obtained by its execution, there is sufficient authority for saying that they might have been put in evidence against fellow conspirators not present when they were made. But we need not spend time upon this consideration, as it is merely a development of that already stated. It is enough to refer to a few of the cases in which it has been applied. *Com-*

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monwealth v. *Scott*, 123 Mass. 222. *Commonwealth* v. *Smith*, 151 Mass. 491. *Commonwealth* v. *Devaney*, 182 Mass. 33, 35. *People* v. *Mol*, 137 Mich. 692 and 4 A. & E. Ann. Cas. 960. *State* v. *Thaden*, 43 Minn. 253. *Card* v. *State*, 109 Ind. 415. *Scott* v. *State*, 30 Ala. 503, 509. Other cases are collected in 12 Cyc. 438, 439.

3. The testimony of Lindauer as to Gaffney's other declarations made to him was competent for the same reasons.

We do not consider the question whether Gaffney's declarations could have been admitted on the ground of his having deceased before the trial. R. L. c. 175, § 66. St. 1898, c. 535. It has been doubted among the profession whether the statute is applicable to criminal proceedings. Apparently it has been assumed not to be so in the trial of an indictment for unlawfully procuring a miscarriage. *Commonwealth* v. *Bishop*, 165 Mass. 148, 152. *Commonwealth* v. *Sinclair*, 195 Mass. 100, 109. These cases were decided under R. L. c. 175, § 65. The question is not presented here, and is mentioned only because of suggestions made by counsel at the argument. It does not appear, and is not probable, that the presiding judge found these declarations of Gaffney to have been made in good faith; and this was a condition precedent to their admissibility even if otherwise competent.

4. The testimony of one Griffin as to his business relations with Stuart was competent. The jury could find that the transactions testified to were a part of the general unlawful scheme in which Stuart and his confederates were engaged. They were not, or rather the evidence indicated that they were not, independent acts of wrongdoing, as in *Commonwealth* v. *Jackson*, 132 Mass. 16. That case is explained and the rule for cases like the one at bar is stated in *Commonwealth* v. *Clancy*, 187 Mass. 191, 196, and *Commonwealth* v. *Blood*, 141 Mass. 571, 576. See also *Commonwealth* v. *Lubinsky*, 182 Mass. 142; *Commonwealth* v. *Smith*, 163 Mass. 411, 417, 418. That this evidence may have tended incidentally to show the commission by Stuart of other specific crimes is no objection to its being received for the purposes for which it was competent, to show the intent with which he acted and the scope and character of the conspiracy into which he had entered and in furtherance of which these particular acts could

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be found to have been committed. Nor was it material that Griffin and Joyce were not included in the indictment. *Graff* v. *People*, 208 Ill. 312, 319. *People* v. *Smith*, 144 Ill. App. 129, 159, affirmed in 239 Ill. 91. *People* v. *Fehrenbach*, 102 Cal. 394. That Griffin was apparently a confederate of Stuart does not affect his competence as a witness. *Bean* v. *Bean*, 12 Mass. 20. Nor do we find that Griffin testified to the contents of the deed given to him. His testimony that the land was in Walpole was directed to the real location of the land, not to what was said about it on the deed.

5. For the reasons already stated, it was competent to prove the dealings of Ramsey and Nutt with Yuill. The testimony was not made too remote by the fact that it related to a transaction in 1903. The conspiracy was a continuing one. It might be found that it began as early as 1901, and continued, though with the addition of some new confederates, into 1906. The exception to the testimony of these witnesses cannot be sustained.

6. The defendant had no right of exception to the ruling that Lindauer might testify in re-direct examination that he relied on the statements of Stuart and Gaffney as to the value of the land which he had been persuaded to take as security for the price of his restaurant. The order of the evidence was wholly in the discretion of the judge. The evidence was material (*Commonwealth* v. *O'Brien*, 172 Mass. 248, 254; *Commonwealth* v. *Drew*, 153 Mass. 588, 595), because it was one of the objects of the conspiracy to palm off worthless security upon sellers by false assurances of its value. The ordinary doctrine (*Commonwealth* v. *Wood*, 142 Mass. 459; *Lynch* v. *Murphy*, 171 Mass. 307) that lies about the value of property are mere dealer's talk does not apply to a case like this, where it could be found that there were confidential relations between Stuart and the victim whom it was intended to defraud, and that the latter was persuaded to rely upon the pretended opinion of Stuart and his confederates. See *Medbury* v. *Watson*, 6 Met. 246, 260; *Dawe* v. *Morris*, 149 Mass. 188, 192; *Kilgore* v. *Bruce*, 166 Mass. 136, 138; *Andrews* v. *Jackson*, 168 Mass. 266; *Whiting* v. *Price*, 169 Mass. 576; *Gurney* v. *Tenney*, 197 Mass. 457, 465; *Rollins* v. *Quimby*, 200 Mass. 162, 164.

We may add that a conspiracy for the attainment of an un-

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lawful end is none the less a criminal offense because some of the means employed, though essentially dishonest, could not by themselves be made the subject of a criminal prosecution. *Commonwealth* v. *Althause*, 207 Mass. 32.

7. The deeds of the Walpole land from Faust to Griffin and from Griffin to Barnes were properly admitted. This land was intended to be used, it could be found, as security in the fraudulent purchases intended to be made. The deeds afforded competent evidence of acts done by two of the alleged conspirators in furtherance of the common design. Faust was one of the defendants named in the indictment. Griffin, as we have seen, could be found to have joined in the conspiracy.

8. The foreclosure of the first mortgage upon the property on which Walton had taken a second mortgage as security for the price of his restaurant was a fact competent to be proved. It tended to show that the property was exhausted in payment of the prior incumbrance, and so to support the contention of the government that the security was worthless from the beginning. The mortgagee's deed was competent to prove the fact of the foreclosure. It does not appear that the deed was allowed to be used as evidence of the truth of the recitals made therein.

9. The parts of Ferguson's testimony which were excepted to cannot be said to have been incompetent. In substance he testified that in 1901 he was made a victim of Stuart and others in a transaction which might be found to have been in furtherance of the alleged conspiracy, and to indicate that this was then under way. His testimony tended also to show that immediately after suffering himself he was induced by Stuart to join in the conspiracy and to assist in defrauding others. All this was admissible. As was said in *Commonwealth* v. *Scott*, 123 Mass. 222, 234, 235, the government had a right to show the whole history of the conspiracy from its commencement to its consummation. And see *Commonwealth* v. *Howard*, 205 Mass. 128, 148. It tended to show the preparations made by Stuart and the beginning and development of his scheme. It was like the evidence which always has been held to be competent that one charged with a crime had made preparations for its commission, or had by word or deed manifested an intention to commit that crime. *Commonwealth* v. *Snell*, 189 Mass. 12, 21. *Commonwealth* v. *Robinson*,

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146 Mass. 571, 577. *Conklin* v. *Consolidated Railway*, 196 Mass. 302, 306, and cases there cited.

10. The judge was right in refusing to order an acquittal on the tenth count. There was evidence that Stuart had obtained Turner's money for a half interest in Sweatt's pretended business, by means of false representations as to the extent and profits of that business. This was enough to constitute larceny, if done with the fraudulent intent alleged by the government. R. L. c. 208, § 26. And the similar transactions with Severance, Merrow and Day, which were in evidence, could be found to have been done as parts of the same general scheme which was carried out with Turner. *Commonwealth* v. *Lubinsky*, 182 Mass. 142. *Commonwealth* v. *Blood*, 141 Mass. 571. *Jordan* v. *Osgood*, 109 Mass. 457, 461. *Horton* v. *Weiner*, 124 Mass. 92. *Boles* v. *Merrill*, 173 Mass. 491. It is of course plain that the conduct and statements of Stuart himself in the other matters which were in evidence, if these were found to have been done in the execution of one and the same unlawful scheme, as the evidence indicated, furnished strong evidence against himself. *Commonwealth* v. *Bond*, 188 Mass. 91.

11. The offense of conspiracy was not merged in the specific crimes afterwards committed in pursuance thereof, although the conspiracy was only a misdemeanor and the subsequent crimes were felonies. *Commonwealth* v. *Walker*, 108 Mass. 309, 314. *Commonwealth* v. *Andrews*, 132 Mass. 263, 265.

We have examined all the exceptions in the case which do not appear to have been waived, and most if not all of those which have not been specifically mentioned are covered by what has been said. We discover no error in the rulings excepted to.

Exceptions overruled.

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COMMONWEALTH *vs.* JOHN W. ELLIS.
SAME *vs.* THOMAS KELLY.

Middlesex. November 14, 1910. — January 9, 1911.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Pleading, Criminal, Indictment or complaint. *Vagabond. Constitutional Law.*

A complaint under R. L. c. 212, § 61, alleged that the defendant on a day named at a certain city, "and on divers other days and times at said [city], was then and there a person known to be a pickpocket and thief and then and there having no visible and lawful means of support and was then and there on said days and times aforesaid at [the city] aforesaid, found prowling around a certain railroad depot in said [city], whereby and by force of the statute in such case made and provided, the said [defendant] was and still is a vagabond." *Held,* that the complaint was not bad for duplicity; that the charge was of a continuing offense, and that the time properly might have been alleged as within a certain period beginning on a day named and ending on a later day named, but that the complaint sufficiently alleged an offense on the day named, and that the words "and on divers other days and times at said [city]" and the later words "on said days and times aforesaid" and also the words "and still is" might be stricken out as surplusage. *Held, also,* that the complaint in following the language of the statute was sufficiently certain, it being plain that the charge of being a vagabond was made under R. L. c. 212, § 61, and was not made under the provisions of § 46 of the same chapter.

R. L. c. 212, § 61, is as follows: "A person who is known to be a pickpocket, thief or burglar and having no visible or lawful means of support, if found prowling around any steamboat landing, railroad depot, banking institution, broker's office, place of public amusement, auction room, store, shop, crowded thoroughfare, car or omnibus, or at any public gathering or assembly, shall be deemed a vagabond, and shall be punished by imprisonment in the house of correction for not less than four nor more than twelve months." *Held,* that this statute is constitutional, the commission of previous crimes referred to in it being used as indications to a certain extent of present character in describing the kind of person constituting a vagabond under the statute.

The previous commission of crimes may be made an element in providing for the punishment to be imposed for a later crime and in the creation of certain kinds of statutory offenses without making the statute containing such provision an *ex post facto* law.

A motion by the defendant in a criminal case for a bill of particulars, which merely states that the defendant "demands that a bill of particulars be furnished him in accordance with his rights under the Revised Laws," properly may be denied, because it does not point out any part of the indictment or complaint about the meaning of which the defendant is uncertain and needs information to enable him to prepare his defense.

Two complaints against different defendants, under R. L. c. 212, § 61, both received and sworn to in the Police Court of

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Lowell on September 1, 1910, each charging that the defendant "on the first day of June, in the year of our Lord one thousand nine hundred and ten, at Lowell aforesaid, and on divers other days and times at said Lowell, was then and there a person known to be a pickpocket and thief and then and there having no visible and lawful means of support and was then and there on said days and times aforesaid at Lowell aforesaid, found prowling around a certain railroad depot in said Lowell, whereby and by force of the statute in such case made and provided, the said [defendant] was and still is a vagabond, against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided."

In the Superior Court the cases were tried together before *Raymond*, J. In each of the cases the defendant moved that the complaint be quashed for the following reasons:

"1. The complaint is bad for duplicity as it charges several distinct acts of prowling on separate days and dates, and because each act is a distinct statutory offense.

"2. Uncertainty as to whether the defendant is charged with being a vagabond under section 46, or section 61 of the Revised Laws, chapter 212, as each section describes different statutory vagabonds.

"3. The complaint is unconstitutional because it alleges that a man is a thief and a pickpocket, and such allegation is in violation of a defendant's character rights under our laws.

"4. There is no allegation as to when a man begins or ceases to be a vagabond, and the law is unconstitutional, because there can be no successful plea of former acquittal or conviction, and the prosecution of the complaint carries with it a cruel and unusual punishment, in that it is practically a life imprisonment at the whim or pleasure of prosecuting officials.

"5. The act is unconstitutional because it is *ex post facto* in that it allows criminal records of past crimes to prove a present criminal intent.

"6. The act is unconstitutional because in the enforcement of it a man's past criminal record is used to convict him of a present crime, thus punishing him twice for the same offense."

In each of the cases the judge denied the motion.

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The defendant in each of the cases then made the following motion for a bill of particulars: "And now comes the defendant above named, and without waiving any legal, statutory, or substantial rights contained in the motion to quash heretofore filed, demands that a bill of particulars be furnished him in accordance with his rights under the Revised Laws."

In each of the cases the judge denied the motion.

In each of the cases the defendant was found guilty and was sentenced to the house of correction for twelve months. The defendant in each case appealed from the order denying his motion to quash the complaint, from the order denying his motion for a bill of particulars, and from the judgment sentencing him to imprisonment for twelve months in the house of correction.

R. L. c. 212, § 61, is as follows: "A person who is known to be a pickpocket, thief or burglar and having no visible or lawful means of support, if found prowling around any steamboat landing, railroad depot, banking institution, broker's office, place of public amusement, auction room, store, shop, crowded thoroughfare, car or omnibus, or at any public gathering or assembly, shall be deemed a vagabond, and shall be punished by imprisonment in the house of correction for not less than four nor more than twelve months."

Section 46 of the same chapter, mentioned above, provides suitable punishments for "rogues and vagabonds, persons who use any juggling or unlawful games or plays, common pipers and fiddlers, stubborn children, runaways," and other kinds of persons enumerated.

P. H. Kelley, (*J. M. Sullivan* with him,) for the defendants.

J. J. Higgins, District Attorney, for the Commonwealth.

KNOWLTON, C. J. These two cases were argued together, and they present precisely the same questions. In each a complaint was made against the defendant under the R. L. c. 212, § 61, charging that he was "a person known to be a pickpocket and thief and then and there having no visible and lawful means of support and was then and there on said days and times aforesaid at Lowell aforesaid, found prowling around a certain railroad depot in said Lowell, whereby and by force of the statute in such case made and provided," he "was and still is a vaga-

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bond," etc. A motion to quash was filed in each case, in which six reasons for the motion were stated.

The complaint is not bad for duplicity. It does not charge distinct offenses. The charge is of a continuing offense, and the time well might have been alleged as within a certain period beginning on a day named and ending on a later day named. But, in the form in which this complaint is made, the allegation sufficiently charges an offense on the first day of June, 1910, and the words, "and on divers other dates and times at said Lowell," add nothing to it. These words, and the later words, "on said days and times aforesaid," and also the words, "and still is," may be stricken out as surplusage. *Commonwealth* v. *Sullivan*, 5 Allen, 511. *Commonwealth* v. *Gardner*, 7 Gray, 494. *Commonwealth* v. *Elwell*, 1 Gray, 468.

The complaint is sufficiently certain. It follows the language of the statute, and in a case of this kind that is sufficient. *Commonwealth* v. *Ashley*, 2 Gray, 356. *Commonwealth* v. *Dyer*, 128 Mass. 70. *Commonwealth* v. *Brown*, 141 Mass. 78.

It is plain that the charge is of being a vagabond under the provisions of the R. L. c. 212, § 61, and not under the provisions of § 46 of the same chapter.

The defendants' counsel have argued at length that the statute is unconstitutional, because of the nature of the allegations that together charge the offense. The statute makes certain conduct punishable, as producing in a man a condition and character that render him an objectionable member of society, whose acts and influence are detrimental to the community. To convict him under this section, it must be shown that he was found prowling around one of the public places mentioned in the statute, and that he was doing this while having no visible and lawful means of support. It must also be shown that he was a person known to be a pickpocket, thief or burglar. His prowling around a public place is active conduct for which he is directly responsible. So too in ordinary cases, in a less marked degree, is his having no visible or lawful means of support. These are matters of conduct and behavior. When they coexist in a person known to be a pickpocket, thief or burglar, they constitute an offense for which he well may be subjected to punishment. The commission of the previous crimes referred to in the

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statute does not constitute a misdemeanor for which he may be prosecuted. To a certain extent they are indications of present character, and they serve to give color to conduct that otherwise might be less pronounced in its indications. That the previous commission of crimes may be considered in determining the punishment to be imposed, and in the creation of certain kinds of statutory offenses, without rendering a statute an *ex post facto* law, has repeatedly been adjudged. *McDonald* v. *Commonwealth*, 173 Mass. 322. *Commonwealth* v. *Graves*, 155 Mass. 163. *Sturtevant* v. *Commonwealth*, 158 Mass. 598. *Commonwealth* v. *Phillips*, 11 Pick. 28. *Plumbly* v. *Commonwealth*, 2 Met. 413. *Tuttle* v. *Commonwealth*, 2 Gray, 505.

The defendant in each case filed a motion for a bill of particulars and appealed from an order denying it. In the substantive part of the motion he merely "demands that a bill of particulars be furnished him in accordance with his rights under the Revised Laws." If he had pointed out any part of the complaint, about the meaning of which he was uncertain and needed information to enable him to prepare his defense, doubtless the court would have ordered the filing of specifications. He might have needed to be told what railroad depot was referred to in the complaint, or what were the particulars of the knowledge that he was a pickpocket and thief; but it does not appear that he needed or desired information of this kind.

The defendants' "rights under the Revised Laws" entitle them to a bill of particulars only when "the charge would not be otherwise fully, plainly, substantially and formally set out," or when it is "necessary to give the defendant and the court reasonable knowledge of the nature and grounds of the crime charged." R. L. c. 218, § 39. *Commonwealth* v. *Snell*, 189 Mass. 12, 19.

Judgment and orders affirmed.

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CHARLES W. RICE *vs.* THE GOVERNOR.

Suffolk. November 16, 1910. — January 9, 1911.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Governor. Mandamus. Supreme Judicial Court.

Money which came into the hands of a Governor from his predecessor in office, who received it from the Federal Government under the terms of 30 U. S. Sts. at Large, 1356, entitled "An Act to reimburse the Governors of States and Territories for expenses incurred by them in aiding the United States to raise and organize and supply and equip the Volunteer Army of the United States in the existing war with Spain," and for the purpose of being paid to the officers and men referred to in the act, was *held* to have been received by the Governor in his official capacity.

The Supreme Judicial Court has no power to issue a writ of mandamus addressed to the Governor of the Commonwealth regarding any of his official duties.

KNOWLTON, C. J. Under the Act of Congress of March 3, 1899, (30 U. S. Sts. at Large, 1356,) which is amendatory of "An Act to reimburse the Governors of States and Territories for expenses incurred by them in aiding the United States to raise and organize and supply and equip the Volunteer Army of the United States in the existing war with Spain," approved July 8, 1898, a sum of money was paid to Curtis Guild, Jr., then Governor of Massachusetts, to be paid to officers and men, referred to in the act, who served in the war with Spain. This money passed into the hands of his successor, the present Governor, and is now subject to his control. By the terms of the act such money, under the circumstances that existed in this State, was "to be paid by the States and Territories direct to the officers and men," and none of it was to "be covered into the treasury of the State or Territory." The petitioner claims a part of the money under assignments from thirty-two soldiers, the validity of which is questioned under § 3477 of the Revised Statutes of the United States, and he has brought this petition for a writ of mandamus to compel the respondent to pay it over.

It is plain that the money came into the hands of the respondent in his official capacity, as Governor of the Commonwealth, and that his only relations to it arose under the act of Congress which dealt with the governors as the executive representatives of the States, and, in States where no payments had been made

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to the men for the services for which the money was awarded, the act sought to impose upon the governors an official duty to pay the money to the men who were entitled to receive it. This duty having been accepted by Governor Guild, and afterwards having been transferred to his successor, the respondent, and having also been accepted by him, the action which the petitioner seeks to compel is in no sense personal, but is strictly official. The most important question in the case is whether a writ of mandamus should be issued against the Governor of the Commonwealth, to compel the performance of an official duty.

This question has been considered in many cases in other States, and the decisions are far from uniform. It is well established that a writ of mandamus will not be issued to compel the doing of a particular act that involves the exercise of judgment or discretion by a public officer. *People* v. *Morton*, 156 N. Y. 136. *State* v. *Chase*, 5 Ohio St. 528. But, ordinarily, a public officer may be compelled to take some action, so far as to exercise his judgment and discretion in determining whether he ought to do or refrain from doing that which the petitioner desires of him in the performance of an alleged public duty.

The Governor of this Commonwealth, under our Constitution, is the "supreme executive magistrate." He is the commander-in-chief of the military and naval forces of the State. In our Constitution the division of the government into three departments, each independent of the other, is provided for in language picturesque and emphatic, "to the end that it may be a government of laws and not of men." Declaration of Rights, art. 30. In other States whose constitutions recognize a similar division of the government, it is generally, if not universally, held that, in the performance of his political duties as the highest executive officer, the Governor is not subject to supervision or direction by the courts. But in some jurisdictions there are decisions that, in the performance of strictly ministerial duties which might have been imposed upon some other officer, the Governor may be compelled to act by a writ of mandamus. See *Railroad Co.* v. *Moore*, 36 Ala. 371; *Harpending* v. *Haight*, 39 Cal. 189; *Martin* v. *Ingham*, 38 Kans. 641; *Magruder* v. *Swann*, 25 Md. 173; *Chumasero* v. *Potts*, 2 Mont. 242; *Cotten* v. *Ellis*, 52 N. C.

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545; *Greenwood Cemetery Land Co.* v. *Routt*, 17 Col. 156; *Chamberlain* v. *Sibley*, 4 Minn. 309; *State* v. *Chase*, 5 Ohio St. 528. But the weight of authority, furnished by decisions in a larger number of States, and supported, as we think, by stronger reasons, is in favor of the proposition that governors of States are not amenable to the courts for their conduct in the performance of any part of their official duties. *Hawkins* v. *The Governor*, 1 Ark. 570. *State* v. *Drew*, 17 Fla. 67. *Low* v. *Towns*, 8 Ga. 360. *People* v. *Cullom*, 100 Ill. 472. *People* v. *Bissell*, 19 Ill. 229. *Hovey* v. *State*, 127 Ind. 588. *State* v. *Warmoth*, 22 La. Ann. 1. *Dennett, petitioner*, 32 Maine, 508. *Sutherland* v. *The Governor*, 29 Mich. 320. *Vicksburg & Meridan Railroad* v. *Lowry*, 61 Miss. 102. *State* v. *Stone*, 120 Mo. 428. *State* v. *The Governor*, 1 Dutch. 331. *People* v. *Morton*, 156 N. Y. 136. *Mauran* v. *Smith*, 8 R. I. 192. *Bates* v. *Taylor*, 87 Tenn. 319. *Teat* v. *McGaughey*, 85 Texas, 478. *Houston, Tap & Brazoria Railroad* v. *Randolph*, 24 Texas, 317. The subject is discussed learnedly by Mr. Justice Cooley in *Sutherland* v. *The Governor*, 29 Mich. 320, 323, where he says: "What is claimed is, that where the act is purely ministerial, and the right of the citizen to have it performed is absolute, the Governor, no more than any other officer, is above the laws, and the obligation of the courts, on a proper application, to require him to obey the laws, is the same that exists in any other case where an official ministerial duty is disregarded. . . . There is no clear and palpable line of distinction between those duties of the Governor which are political, and those which are to be considered ministerial merely; and if we should undertake to draw one, and to declare that in all cases falling on one side of the line the Governor was subject to judicial process, and in all falling on the other he was independent of it, we should open the doors to an endless train of litigation. . . . The apportionment of power, authority and duty to the Governor, is either made by the people in the Constitution, or by the Legislature in making laws under it; and the courts, when the apportionment has been made, would be presumptuous if they should assume to declare that a particular duty assigned to the Governor is not essentially executive, but is of such inferior grade and importance as properly to pertain to some inferior office, and consequently, for the purposes of their jurisdiction,

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the courts may treat it precisely as if an inferior officer had been required to perform it. To do this would be not only to question the wisdom of the Constitution or the law, but also to assert a right to make the Governor the passive instrument of the judiciary in executing its mandates within the sphere of his own duties. Were the courts to go so far, they would break away from those checks and balances of government which were meant to be checks of co-operation, and not of antagonism or mastery, and would concentrate in their own hands something at least of the power which the people, either directly or by the action of their representatives, decided to entrust to the other departments of the government."

Similar doctrine is stated in other cases cited above. We think it would be an unfortunate rule of law that would require this court, at the request of a petitioner, to scrutinize the official conduct of the Governor, in order to determine whether certain of his acts or omissions were in matters merely ministerial, or in the exercise of executive functions which properly pertained to his office. An order under a writ of mandamus against the Governor, if he should refuse to obey it, might present the strange spectacle of a direction by the court to the executive forces of the government, to coerce and punish the chief executive officer of the State, who commands and controls the military forces that are ultimately relied upon for the maintenance of law and order. It seems better to hold that, for whatever he does officially, the Governor shall answer only to his own conscience, to the people who elected him, and in case of the possible commission of a high crime or misdemeanor, to a court of impeachment. For these reasons we are of opinion that the petition should be dismissed.

In the view we have taken of the case, we cannot determine judicially which of the parties is right in his contention as to the validity of the assignments under which the petitioner claims.

Petition dismissed.

H. T. Richardson, for the plaintiff.

D. Malone, Attorney General, *& F. B. Greenhalge*, Assistant Attorney General, for the defendant.

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JOHN H. TRAYNE *vs.* WINSLOW B. BOARDMAN.

Suffolk. December 8, 1910. — January 9, 1911.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Deceit. Fraud. False Representations.

At the hearing by a judge without a jury of an action of tort for deceit to recover damages for the sale of a mining claim to the plaintiff by the defendant through false and fraudulent representations, it appeared that the fraud was committed and that the mining claim was worthless; and there was evidence tending to show that because of the representations by the defendant the plaintiff had arranged with persons other than the defendant to advance for the purchase of the claim the price agreed upon between him and the defendant and that, upon receiving a deed of the claim, a corporation should be formed by the plaintiff and the persons other than the defendant, to which the plaintiff was to convey the mining claim in return for some shares of the capital stock of the corporation. There also was evidence that one of such persons paid the purchase price to the defendant, and that the defendant thereupon conveyed the mining claim to the plaintiff, the plaintiff himself paying nothing to the defendant. The defendant asked the presiding judge to rule that, if the plaintiff had advanced no money, he could recover nothing, and that the action was premature because the plaintiff had not reimbursed the third person for the money the third person had advanced to the defendant. The rulings were refused. There was a finding for the plaintiff, and the defendant alleged exceptions. *Held*, that the rulings were refused rightly; that there was evidence of substantial damage to the plaintiff because of the worthless character of the mining claim; and that the action was not brought prematurely since the damage accrued to the plaintiff as soon as he received the deed from the defendant.

TORT for deceit in the sale of a mining claim as stated in the opinion. Writ in the Municipal Court of the City of Boston dated October 26, 1907.

On appeal to the Superior Court the case was heard by *Dana*, J. The material facts are stated in the opinion. The judge found for the plaintiff in the sum of $500; and the defendant alleged exceptions.

W. A. Rollins, for the defendant.

W. H. Wood, for the plaintiff.

KNOWLTON, C. J. This is an action of tort for deceit, founded on the fraudulent representations of the defendant in regard to a mining claim sold by him to the plaintiff. It is agreed that, for the purposes of this decision, the fraud is to be

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taken as proved. Exceptions were taken to the refusal of the judge to give the following rulings requested by the defendant: "1. If the plaintiff has advanced no money he cannot recover anything in this action. 2. If the plaintiff has not repaid Ward he cannot recover anything in this action. The plaintiff's action is premature. 3. On all the evidence the plaintiff is not entitled to recover."

It appears that the plaintiff negotiated with the defendant for the purchase of a mining claim, and agreed to pay $500 for it. The deed of it was sent by the defendant to the plaintiff, attached to a draft for $500, to be paid on delivery of the deed. The draft was not paid, and afterwards $500 was sent by one Ward and the deed to the plaintiff was delivered. The evidence tended to show that this money was advanced by Ward, under an arrangement with the plaintiff, whereby a corporation was to be formed, the plaintiff turning over the mining claim, and Ward and others furnishing the $500 which the plaintiff was to pay the defendant for it, and the plaintiff was to receive a part of the stock in the corporation for furnishing the mining claim at this price. There is nothing in this arrangement that deprives the plaintiff of his right of action for the defendant's fraud. No question of law was saved in regard to the amount of his damages. It is fairly to be presumed that his arrangements with Ward and others, in reference to the proposed corporation, were such that he suffered substantial damages from the fact that the mining claim was worthless, as it seems to have been. If the defendant's representations had been true, it probably would have had a substantial value.

The plaintiff was the only one who entered into contractual relations with the defendant in regard to the mining claim, and the only one to whom the fraudulent representations were made.

The action was not prematurely brought. The plaintiff's damage accrued as soon as he received the deed, which should have given him a good mining claim, but was in fact, as we suppose, a worthless piece of paper.

Exceptions overruled.

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WILLIAM J. McGURK *vs.* STANDARD PLATE GLASS COMPANY.

Suffolk. December 8, 1910. — January 9, 1911.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Contract, Construction, Termination. *Reference and Referee.*

A salesman made with a corporation a contract in writing for employment, the contract containing the following provision as to its termination: "Either party may . . . terminate this agreement, by giving to the other party, sixty days' notice in writing, and accompanying such notice by a signed statement of the cause for terminating the agreement, said statement of cause to bear the written indorsement of T. and B. . . . that they are informed of the facts referred to in the cause set forth, and consider them sufficient justification for the termination of the agreement under this provision." The corporation made a formal statement in writing to T. and B. of alleged "insolence and insubordination" on the part of the salesman, and the salesman also made to them a statement in writing regarding the matter. Thereafter the corporation gave to the salesman sixty days' notice in writing of the termination of the contract for "insolence and insubordination," accompanied by a written indorsement by T. and B. stating, "We are informed of the facts referred to in the causes above set forth for the termination of the contract . . . and consider them sufficient justification for the termination of said agreement." There was no fraud or mistake which prevented T. and B. from exercising their judgment fairly. In an action by the salesman against the corporation for breach of the contract, the salesman contended that the contract could not be terminated without an indorsement in writing by T. and B. which should not be made until after the charges had been formally heard by them in a judicial manner. *Held*, that such formal hearing was not necessary under the provisions of the contract; and that everything necessary effectually to terminate the contract had been done.

CONTRACT upon an agreement in writing as described in the opinion. Writ dated August 6, 1907.

In the Superior Court the case was tried before *White*, J., upon an agreed statement of facts, the substance of which is stated in the opinion. The trial judge ordered a verdict for the defendant, and at the request of the parties reported the case to this court, judgment to be entered on the verdict if the ruling was correct; otherwise, judgment to be entered for the plaintiff in the sum of $2,844.33.

The case was submitted on briefs.

J. F. Bacon, for the plaintiff.

J. Gordon, for the defendant.

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KNOWLTON, C. J. The plaintiff and the defendant entered into a contract in writing which, omitting the merely formal parts, is as follows: "The purpose of this agreement is the employment by the Standard Plate Glass Company of William J. McGurk as sales manager of their New England branch at Boston, Mass., during the period from January 1, 1907 to December 31, 1908, at a salary of $3,600 per year, payable in equal monthly instalments; provided that either party may, after January 31, 1907, terminate this agreement by giving to the other party, sixty days' notice in writing, and accompanying such notice by a signed statement of the cause for terminating the agreement, said statement of cause to bear the written indorsement of J. H. Troutman and W. D. Brandon of Butler, Pa., that they are informed of the facts referred to in the cause set forth, and consider them sufficient justification for the termination of the agreement under this provision." The defendant terminated the agreement according to its terms by giving the plaintiff sixty days' notice, accompanying the notice by a signed statement of the cause for terminating the agreement, which cause was stated to be "insolence and insubordination." That statement bore the written indorsement of J. H. Troutman and W. D. Brandon, duly signed by them, as follows: "We are informed of the facts referred to in the causes above set forth for the termination of the contract of the Standard Plate Glass Company with William J. McGurk, and consider them sufficient justification for the termination of said agreement." This action is brought to recover damages for a breach of the contract.

The principal contention of the plaintiff is that, under this agreement, Troutman and Brandon could not make the required indorsement without first having a hearing of the parties, conducted judicially, at which they might present their respective views with arguments. The decision of the case depends upon the construction to be put upon this contract. It does not refer to a hearing to be had by these two persons. It simply calls for an indorsement in writing, upon the statement of causes, that they are informed of the facts and deem them sufficient. It neither states nor implies anything more than that the two persons, who in a certain sense may be called arbitrators, shall be informed of the facts in some way that they think should give

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them a sufficient understanding of the facts to justify their action. The contract implies that the extent of their information, and the manner of obtaining it, as a ground for their indorsement, should be left to their judgment and sense of right. There is nothing in it to indicate that a formal hearing of the parties would be needed if the arbitrators thought that they had all necessary information without it.

The following language of the opinion in *Palmer* v. *Clark*, 106 Mass. 373, 389, is applicable to the conditions in the present case. "By the agreement, he is made the sole and final judge in a matter where it was evidently considered difficult to attain entire accuracy. This agreement, made by competent parties upon a good consideration, it is the duty of the court to enforce. A reference to a third person to fix by his judgment the price, quantity or quality of material, to make an appraisement of property and the like, especially when such reference is one of the stipulations of a contract founded on other and good considerations, differs in many respects from an ordinary submission to arbitration. It is not revocable. The decision may be made without notice to or hearing of the parties, unless such notice and hearing be required by express provision or reasonable implication; and it may be made upon such principles as the person agreed on may see fit honestly to adopt, or upon such evidence as he may choose to receive. . . . It [his decision] cannot be impeached for mistake arising from error in the judgment of the referee, or in drawing conclusions from evidence and observation. To avoid it, the mistake must be one which shows that he was misled, and so far misapprehended the case that he failed to exercise his judgment upon it; as where he is imposed upon by false measures or false weights, or there is obvious error in figures. . . . Fraud practised upon him, or by him, will of course defeat it." See also *Robbins* v. *Clark*, 129 Mass. 145; *Flint* v. *Gibson*, 106 Mass. 391, 395; *New England Trust Co.* v. *Abbott*, 162 Mass. 148, 154.

In the present case there is no suggestion of fraud or mistake which prevented the arbitrators from exercising their judgment fairly. Both parties sent to each of them a communication in writing, presenting their respective views in reference to the subject of terminating the agreement, and there was suffi-

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cient foundation for the statement of the arbitrators that they were informed of the facts. There is nothing to indicate that they failed to act fairly and in good faith, according to their understanding.

The record shows an agreement, deliberately entered into, which left the subject of a termination of the agreement by either party to the decision of the two men named, to be made upon such information, so obtained, as they should think sufficient to enable them to act properly, and to reach a just conclusion. Action has been taken under it in strict compliance with its terms.

Judgment on the verdict.

ATTORNEY GENERAL *vs.* SUPREME COUNCIL AMERICAN LEGION OF HONOR.

HACKETT'S CLAIM.

Suffolk. January 5, 1911. — January 9, 1911.

Present: KNOWLTON, C. J., LORING, BRALEY, SHELDON, & RUGG, JJ.

Fraternal Beneficiary Association.

The decisions of this court previously made in *Skinner's Claim*, in *Doleac's Claim* and in *Dreyfus's Claim* in the case of *Attorney General* v. *American Legion of Honor*, reported in 206 Mass. 175, 180, here were affirmed, and the principles settled by those decisions were applied to a claim, filed later under a special interlocutory decree, presenting similar facts.

PETITION, filed on June 13, 1910, in the suit of *Attorney General* v. *American Legion of Honor*, previously before this court in cases reported in 196 Mass. 151, and 206 Mass. 131, 158, 168, 175, 180, 183, 186, 188, 190, 193, the petitioners in the present claim being the same persons who were the plaintiffs in the suit in equity reported in 206 Mass. 139. It there was decided, on May 19, 1910, that the plaintiffs were entitled to a decree, but that the only decree that could be entered was one that the corporation should make the payment to the plaintiffs, the plaintiffs having proceeded with their suit after the appointment of a receiver instead of becoming intervening petitioners in the receivership suit.

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On June 27, 1910, *Sheldon*, J., made an interlocutory decree in the receivership suit permitting the petitioners on or before September 15, 1910, to file and establish before the receiver a claim to share in the assets in his hands as of May 1, 1905, to be determined in accordance with the decisions of this court made on May 24, 1910, subject to certain terms and conditions as to the amount to be allowed, without interest, and as to deductions and taxable costs.

On December 21, 1910, the receiver filed a report in regard to the proof of the claim under the interlocutory decree.

On December 24, 1910, *Braley*, J., at the request of the petitioners, reserved the case for determination by the full court, upon the petition, the interlocutory decree thereon, and the report of the receiver, which it was agreed should be treated as an agreed statement of facts under the interlocutory decree.

The case was submitted on briefs.

H. A. Wyman, receiver, *pro se*.

L. Sullivan & F. W. Bacon, for the claimants.

LORING, J. The question of the petitioners' right to share in the emergency fund is an altogether different question from their right to a judgment against the corporation. *Attorney General* v. *American Legion of Honor (Dunlavy's Claim)*, 206 Mass. 168, 172. The petitioners established their right against the corporation in the case before this court in *Hackett* v. *American Legion of Honor*, 206 Mass. 139. The purpose of the present petition is to establish their right to share in the emergency fund, for that is the only fund in the hands of the receiver.

James P. Hackett, the member under whom the petitioners claimed, paid two assessments of the reduced amount and died on November 26, 1900. The petitioners took $1,900 in settlement of their claim and surrendered the certificate for cancellation on April 4, 1901. The $1,900 was not received by the petitioners under protest, and the corporation received no notice from the petitioners that they claimed that they were entitled to the larger sum until the suit against the corporation (which we have already spoken of) was begun on April 16, 1904. The combined period of acquiescence is less than a month shorter than that in *Skinner's Claim*, 206 Mass. 175, 179. The case at bar is governed by that case and *Doleac's Claim*, 206 Mass. 175.

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The petitioners seek to escape from this result in several ways. In the first place they point out that Hackett was ill during the month and twenty-six days during which he lived after the invalid by-law went into effect. But it is apparent that although ill in body his mental capacity was not impaired. They say in the second place that Hackett made a tender. But the tender made by him was made to the treasurer of the local council, and that is not a tender to the corporation. *Dreyfus's Claim*, 206 Mass. 180. Lastly they say that when Hackett surrendered his policy to be exchanged for a $2,000 policy under the invalid by-law it was returned to him after October 1 and thereby the defendant waived its rights to cut down this policy. But that is not so. The policy was surrendered in August and was returned then because the by-law was not to go into effect until October. Manifestly this was done to preserve the right of the beneficiaries named in that policy to the larger sum in case Hackett died before October 1 when the new by-law was to go into effect.

Under the terms of the interlocutory decree under which this belated petition was allowed to be filed, the entry must be

Bill dismissed with costs.

LAURENCE MINOT & others, trustees, *vs.* TREASURER AND RECEIVER GENERAL.

Suffolk. December 5, 1910. — February 13, 1911.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Tax, On legacies and successions. *Inheritance Tax. Power. Constitutional Law.*

By St. 1909, c. 527, § 8, a succession tax is imposed on property received by the heirs of the settlor under a provision of a deed of trust, made in 1844, by reason of the failure of the beneficiary for life, who died after the passage of the statute, to exercise a power of testamentary appointment given to her by the deed of trust.

It is within the constitutional power of the Legislature to declare that property, which is subject to disposition by testamentary appointment and in default of such appointment is to go to certain persons or to a class of persons named, does

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not vest in anybody as to its possession and enjoyment until the donee of the power of appointment exercises the power or dies without exercising it, and that when such property vests in possession, either by reason of an exercise of the power or by reason of a failure to exercise it, a succession tax shall be imposed; and therefore the provision to this effect in St. 1909, c. 527, § 8, is constitutional.

KNOWLTON, C. J. This case comes before us by reservation on an appeal from a decree of the Probate Court,* instructing the trustees that a succession tax is due upon certain property, referred to in a deed of trust † which conveyed the property to trustees who were to pay the income of it to Nancy Willing Wharton for her life, and on her death to convey it to such person or persons as she by her will, or by any instrument of appointment in the nature of a will, should devise or bequeath it to, or should order and appoint to receive it; and in default of such will or instrument of appointment, to convey it in fee to her heirs at law. Mrs. Wharton has deceased, leaving a will in which she expressly disclaimed any intention to exercise any power of appointment that she might have.

The respondent claims a succession tax upon the property under the St. 1909, c. 527, § 8, the first part of which is as follows: "Whenever any person shall exercise a power of appointment derived from any disposition of property made prior to September first, nineteen hundred and seven, such appointment when made shall be deemed to be a disposition of property by the person exercising such power, taxable under the provisions of chapter five hundred and sixty-three of the acts of the year nineteen hundred and seven, and of all acts in amendment thereof and in addition thereto, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power, and had been bequeathed or devised by the donee by will; and whenever any person possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a disposition of property taxable under the

* The decree in the Probate Court was made by *Grant*, J. The reservation after the appeal was made by *Rugg*, J.

† This was a marriage settlement, executed on May 8, 1844. Mrs. Wharton died on August 17, 1909.

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provisions of chapter five hundred and sixty-three of the acts of the year nineteen hundred and seven and all acts in amendment thereof and in addition thereto shall be deemed to take place to the extent of such omission or failure in the same manner as though the persons or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure." This statute was intended to cover certain cases where property, passing into the possession of new owners, was not previously subject to a tax upon the succession, and other cases where, with a possible construction of previous statutes, the property might be subject to a tax under them. It provides that the taxation shall be in the same manner as though the property belonged absolutely to the donee of the power, and had been bequeathed or devised by the donee by will. In this respect the provision is different from the construction that was given by this court to the previous statute, in its application to the taxation of property passing under the execution of a power. *Emmons* v. *Shaw*, 171 Mass. 410. The statute must be held to cover all cases that come within its terms, and to supersede all previous inconsistent legislation applicable to such cases.

The facts of the case before us are strictly within the language and purpose of the statute, and our decision must be governed by this enactment if it can be supported as constitutional.

It is contended that it calls for a taking of property without due process of law, because the persons who would take under a previously existing will or deed containing a power of appointment, if the power is not exercised, have a vested right in the property under the will or deed, such that their subsequent acquisition of it, in possession and enjoyment, is not a succession, and cannot be taxed as such.

It generally has been held that a title derived through a power of appointment in a will or deed is to be taken as coming from the donor of the power, rather than from the donee. But in many particulars the donee is often more directly responsible for the possession and enjoyment of the beneficiary than the donor. This is referred to in some of the cases from the Eng-

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lish reports that are cited in *Emmons* v. *Shaw*, 171 Mass. 410, 413. In England it is expressly provided by statute that, in the case of a general power, the person executing the power shall be deemed to be the one from whom the estate is received. The reasonableness of this doctrine is also shown in the opinion in *Chanler* v. *Kelsey*, 205 U. S. 466.

The condition of property which is subject to a general power of appointment contained in a will or deed, and which, in default of appointment, is to be given over to persons named, is peculiar. The donee of the power has no title to it, but he has an absolute right to dispose of it by the exercise of the power. If the power is to dispose of it by an instrument in the nature of a will signed by three witnesses, as was the fact in this case, if he exercises the power the property becomes a part of his estate for administration after his death, and may be used for the payment of his debts. His relation to it is very much like that of an owner. *Clapp* v. *Ingraham*, 126 Mass. 200. *Olney* v. *Balch*, 154 Mass. 318. Those who would take, in default of an appointment, have only an interest which is contingent upon the conduct of the donee of the power, who can make it vest in them absolutely in possession, or can defeat it altogether. He can make it vest in possession by an appointment to the persons named as the takers in default of appointment, in which case it will be theirs, subject only to a possible use for the payment of his debts, or he can do it by an omission to exercise the power, or he can dispose of it by an appointment to others, thus terminating the contingent interest and leaving the contingent remaindermen nothing. After a will or deed containing such a power has taken effect and before the donee of the power has acted under it, have all rights of succession in possession and enjoyment so vested that there is no possibility of a succession that will come into existence later, when the final disposition of the property is determined by an exercise of the power or by a failure to exercise it? It is held, and so far as we know without dissent, that, through the exercise of the power, a right of succession to property may come into existence afterwards, which properly may be a subject for the imposition of a tax. *Emmons* v. *Shaw*, 171 Mass. 410. *Crocker* v. *Shaw*, 174 Mass. 266. *In re Dow's estate*, 167 N. Y. 227. *In re Cooksey's estate*, 182 N. Y. 92. *Chanler* v. *Kelsey*,

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205 U. S. 466. The tax is imposed as of the time when the succession in possession and enjoyment occurs through the happening of the event that determines it.

The cases above cited, from the New York Court of Appeals and the Supreme Court of the United States, show that the succession is not so vested, in those who will take if the power is not exercised, that it may not go to the appointee through the exercise of the power of appointment. Until the time comes for the final determination, it is not established as belonging to any one. Then comes the statute which we are considering, and which was considered in the above cited cases in New York and in the Supreme Court of the United States. It declares, in substance, that the exercise of the power shall be considered as giving the succession to the appointees, and that the refusal or omission to exercise the power shall be considered as giving the succession to the persons who are to take in default of the exercise of it. The statute treats the result as depending upon the conduct of the donee, who may appoint or refrain from appointing. If he appoints, the succession under the statute is to be treated as determined by him, and the right thus acquired by the appointee is treated as taxable, because received as a benefit under our law. Can there be any doubt of the power of the Legislature so to treat the coming of the appointee into the succession? It seems not. To this extent the cited cases seem to go.

It is but a short step further to apply the second part of the statute, which refers to coming into succession through the conduct of the donee in refusing or omitting to make an appointment that might carry the succession elsewhere. While he has the power of appointment, he is in control of the succession. He may allow it to go to the persons named in the will or deed, or he may transmit it elsewhere. By exercising the power he may even give his own creditors the benefit of it after his death. When property is held subject to such possibilities of disposition, is it usurpation or an unlawful interference with vested rights for the Legislature to say that the succession in possession and enjoyment is not yet determined, that it belongs to no one until it is determined, that the determination of it depends upon the will and conduct of the donee of the power,

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and that when it is determined by his conduct, either by action or by refraining from action, it shall be subject to a tax? We think it is in the power of the Legislature to say, in reference to succession in possession after the death of the persons whose decease is awaited, that property so held is not vested in anybody, and that when it vests in possession, through a proper disposition of it which is dependent upon the will and conduct of the donee, a succession tax shall be imposed. We think that *Chanler* v. *Kelsey*, *ubi supra*, looks in this direction, although it does not discuss this particular subject. The decision in *Moffitt* v. *Kelly*, 218 U. S. 400, published since the argument in the present case, is almost, if not quite, decisive of the question.

The decision to the contrary in *In re Lansing*, 182 N. Y. 238, was by four of the judges, two others dissenting in a well reasoned opinion. So the decision in the *Matter of Chapman*, 133 App. Div. (N. Y.) 337, which was afterwards affirmed by the Court of Appeals in 196 N. Y. 561, without an opinion, was by three judges, while two others joined in a dissenting opinion.

We hold that the decree of the Probate Court was correct.

Decree of Probate Court affirmed.

F. Brewster, for the trustees.

D. Malone, Attorney General, & *F. T. Field*, Assistant Attorney General, for the respondent.

MARIANO DEMINICO *vs.* DAVID CRAIG & others.

Worcester. October 6, 1910. — February 27, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Equity Jurisdiction, To enjoin unlawful strike, Injunction, Damages. *Strike. Labor Union. Damages.*

Whether the purpose for which a labor strike is instituted is or is not a legal justification of the strike is a question of law.

In order that a labor strike should be a legal one it is necessary that the strikers should have acted in good faith in striking for a purpose which the court holds to have been a justification of the strike.

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A labor strike is not a legal one merely because the strikers instituted it in good faith for a purpose which they thought to be a legal justification of the strike.

It is not a justification of a labor strike that a foreman is "distasteful" to some of the employees under him.

A labor strike properly cannot be said to be for the purpose of bettering the condition of the workmen concerned in it merely because its purpose is to escape from something which the workmen dislike.

It here was said by way of illustration, that, if a foreman was in the habit of using epithets so insulting to the workmen under his direction that they could not maintain their self respect while working under him, a strike to get rid of him would be a lawful one.

A labor strike to get rid of a foreman because some of the workmen under him have a dislike for him is not a strike for a legal purpose.

In a suit in equity seeking an injunction to restrain an unlawful labor strike to prevent the employment of the plaintiff as foreman by a certain firm, where the bill contains also a prayer for damages, if the plaintiff proves a case entitling him to relief, but before the time for a final decree the firm in question have stopped work and have ceased to employ either foremen or workmen, there is no occasion for an injunction and the only relief that can be granted is an award of damages.

In a suit in equity to enjoin an unlawful strike to prevent the employment of the plaintiff as foreman by a certain firm, with a prayer for damages, damage to the plaintiff's reputation may be a proper element of damage if he proves that damage to his reputation was in fact caused by the defendants' illegal action.

LORING, J. This bill is brought by a member of the Milford Branch of the Granite Cutters' International Association of America against the president and secretary of the association and certain members of it who constituted its adjustment committee. The plaintiff seeks to have the defendants enjoined from combining against his employment as a foreman by Wells Brothers, and for damages. The case went to a master and is before us on his report.*

The plaintiff and one Ardolino had been employed by Wells Brothers as the foremen of their stone quarry at Hopkinton since March, 1909 (when work was begun there to furnish the stone for a building in process of erection in Boston), until the matters here complained of took place in the following June. On the evening of June 22, 1909, the Milford Branch of the association voted to refuse to continue at work under the plaintiff and Ardolino as foremen, and pursuant to that vote none of the

* The bill was filed in the Supreme Judicial Court on July 15, 1909. The case was referred to Arthur P. Hardy, Esquire, as master, and later was reserved by *Rugg*, J., upon the bill and answer and the master's report for determination by the full court.

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men employed by Wells Brothers went to work on June 23, the next day. A meeting was had between Wells Brothers and the adjustment committee of the association on that next day, June 23, and the result of it was an agreement between Wells Brothers and the officers of the association by which the men went back to work on the following day, June 24, and the plaintiff and Ardolino were removed as foremen on Saturday night, June 26. The plaintiff thereafter worked as a journeyman for Wells Brothers until January 10, 1910, when work at the quarry ceased.

The occasion for the strike was a discharge or a supposed discharge by the plaintiff of one Tronconi on the morning of June 22. There was a rule of Wells Brothers forbidding the men to enter the blacksmith shop. On the day in question Tronconi went into the blacksmith shop to get some tools which were being sharpened for him and was ordered out by Ardolino, the other foreman. Later the plaintiff gave Tronconi some instructions which Tronconi understood to mean that he was discharged. But the plaintiff always denied that he intended to discharge Tronconi. Thereupon on the same day the president and two members of the adjustment committee of the association had a conference with the plaintiff and Tronconi. At this conference Tronconi insisted that he had been unjustly discharged, the plaintiff denied that he had discharged him at all, and told him to go back to his work. The meeting of the association was held on the evening of that day, the strike followed the next day and was ended by the agreement reached on the afternoon of the second day, as we have already stated.

We pass by certain findings made by the master on issues raised by the pleadings which have now become immaterial, and come to his finding on the only issue now in dispute, namely, Was the strike for a justifiable purpose?

The master begins the part of his report in which that question is considered with this finding: "I find . . . that the respondents in securing his [the plaintiff's] removal were actuated by personal objections some of them had against his continuance in the office of foreman."

We take this finding as to the "respondents" to be a finding as to the action of the members of the Milford Branch of the

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association of which branch the defendants were officers, and that the defendants were liable if the action of the association was illegal because they personally participated in it. As is pointed out by the defendants in their answer, there are no sufficient allegations in the bill to make all the members of the association, as a class, parties defendant. See *Pickett* v. *Walsh*, 192 Mass. 572, 589.

The Milford Branch of the association had a membership of two hundred and sixty-four granite cutters and tool sharpeners working in four different shops, one of which was the shop in question run by Wells Brothers. Ninety-seven of the two hundred and sixty-four were employed by Wells Brothers, and of this number the master finds that probably not more than one-third attended the meeting on the evening of June 22.

The master's further findings on this point are in substance as follows: "While it is probable that the complainant made some minor mistakes, I am of the opinion that his work as foreman was acceptable to Wells Brothers Company, and that he was sufficiently competent to fill the position to the satisfaction of the company. No workman lost any pay or otherwise suffered any actual damage by reason of any mistakes made by the complainant. In regard to the enforcement of the rules, I find that the rules were established by the company, and that it was the duty of the complainant as foreman to see that they were enforced. I am of the opinion that the real complaint of the majority of the men claiming to have a grievance against the complainant and his fellow foreman Ardolino, was because of their enforcement of these rules, and that they did enforce them more strictly than the men had been accustomed to having them enforced." The master then states the attempts made by the plaintiff and Ardolino to enforce the rules of their employers, Wells Brothers. He finds that they (1) had attempted to have the rule against going to the blacksmith shop strictly enforced; (2) to stop the men's knocking off work a few minutes before the working day ended; (3) to stop their using the compressed air to brush their clothes; and (4) in one instance to stop a man's eating his luncheon during working hours. The master's findings which follow are in these words: "I find that in doing these things the complainant did only what it was his duty as

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foreman to do, and while the enforcement of the shop rules may have been more rigid than what the men were accustomed to, the personal attitude and conduct of the complainant toward the men was not unduly severe or in any way oppressive, although some of the witnesses testified that they so considered it. To attempt to give in detail the various reasons given by the witnesses for their dislike or objection to the complainant as foreman would require substantially a résumé of the entire testimony. Many of these objections appear to one not skilled in the trade as being trivial, and none of them were brought to the attention of the adjustment committee or any officer of the branch until June 22, 1909. At the special meeting the dislike and various objections of the men were voiced to some extent. It is quite possible that what appears to an outsider to be trivial in a single instance may, in the aggregate, have appeared to the men engaged in the work to be of more or less serious importance. I am quite strongly of the opinion that were it not for the existence of the present case, many of the complaints brought out by the testimony would not have received any consideration by the branch or have been made the subject of a complaint to the committee or officers of the branch by the men themselves, yet it is clear that there was a substantial feeling of dislike and objection on the part of some of the men working at Wells Brothers to the continuance of the complainant and Ardolino as foremen." After a finding that the vote of the men on the evening of June 22 would not have been carried without the assistance of the votes from members not working for Wells Brothers, the master continues in these words: "I find that neither the complainant's habits, conduct nor character were such as to render him an unfit associate in the shop for ordinary workmen of good character, and that, but for the strike, Wells Brothers would not have removed the complainant from his position as foreman; that the strike was instigated by a comparatively few men who were successful in inducing other members to adopt their suggestions and join them in their purpose to secure the complainant's removal as foreman, although they testified that their purpose was to secure better conditions regardless of the consequences which might ensue to the complainant."

In two instances in his report the master has made a distinc-

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tion between what was testified to by the defendants or in their behalf and what he finds to have been the fact. The first instance is where he finds that the plaintiff's personal attitude and conduct was not unduly severe or oppressive "although some of the witnesses testified that they so considered it." The second instance is where the master finds "that the strike was instigated by a comparatively few men who were successful in inducing other members to adopt their suggestions and join them in their purpose to secure the complainant's removal as foreman, although they testified that their purpose was to secure better conditions." We interpret this to be a finding that the purpose of this strike was not to "secure better conditions" for the workmen as distinguished from a purpose to get rid of a foreman who was disliked by some of the employees. To conclude the statement of the master's findings on the purpose of the strike he found that the reasons "for their dislike or objection" to the plaintiff and Ardolino were "trivial" and would not have received any consideration had it not not been for the existence of the present case; and that these reasons "dislike and objection" were founded on a feeling of grievance because of the "enforcement of these rules . . . more strictly than the men had been accustomed to having them enforced."

Whether the purpose for which a strike is instituted is or is not a legal justification for it, is a question of law to be decided by the court. To justify interference with the rights of others the strikers must in good faith strike for a purpose which the court decides to be a legal justification for such interference. To make a strike a legal strike it is necessary that the strikers should have acted in good faith in striking for a purpose which the court holds to have been a legal purpose for a strike, but it is not necessary that they should have been in the right in instituting a strike for such a purpose. On the other hand a strike is not a strike for a legal purpose because the strikers struck in good faith for a purpose which they thought was a sufficient justification for a strike. As we have said already, to make a strike a legal strike the purpose of the strike must be one which the court as matter of law decides is a legal purpose of a strike, and the strikers must have acted in good faith in striking for such a purpose.

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The purpose of the strike here in question has been found to have been to get rid of two foremen because some of the workmen had personal objections to and a dislike for them. Or, to use the words of their own counsel, because these foremen were "distasteful to [some of] the employees." We are of opinion that that is not a legal purpose for a strike. The plaintiff had a right to work and that right of his could not be taken away from him or interfered with by the defendants unless it came into conflict with an equal or superior right of theirs. The defendants' right to better their condition is such an equal right. But to humor their personal objections, their likes and dislikes, or to escape from what "is distasteful" to some of them is not in our opinion a superior or an equal right.

It is doubtless true that in a certain sense the condition of workmen is better if they work under a foreman for whom they do not have a personal dislike, that is to say, one who is not "distasteful" to them. But that is not true in the sense in which those words are used when it is said that a strike to better the condition of the workmen is a strike for a legal purpose. One who betters his condition only by escaping from what he merely dislikes and by securing what he likes does not better his condition within the meaning of those words in the rule that employees can strike to better their condition.

The defense in the case at bar has not failed because a strike to get rid of a foreman never can be a strike for a legal purpose. We can conceive of such a case. If, for example, a foreman was in the habit of using epithets so insulting to the men that they could not maintain their self respect and work under him, a strike to get rid of him in our opinion would be a legal strike. It is not necessary in the case at bar to define such cases and lay down their limits. It is wiser, in our opinion, in matters such as we are now dealing with, to go no farther than to decide each case as it arises. What we have just said is said to prevent misapprehension as to what is now decided. What we now decide is that a strike to get rid of a foreman because some of the employees have a dislike for him is not a strike for a legal purpose.

For these reasons a majority of the court are of opinion that the strike was not a legal one.

It appears that the work at Wells Brothers ceased on January

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10, 1910. There is therefore no occasion for an injunction to issue in the case at bar.

The master found that the difference between the plaintiff's wages as foreman and as a journeyman for the period in which he was employed by Wells Brothers is $110.62, and then made the following finding: "In addition to this the complainant claims the right to recover damages for his loss of position as foreman, damage to his reputation, and the hindering of his prospects of advancement. I make no ruling on this contention of the complainant or his right to recover for the difference between what he formerly earned and that which he now receives, and without intimating in any way that he is entitled to recover anything, but in order that the court may have all of the facts before it at the hearing on this report, I find that if the court shall rule that the strike was not justifiable and that the complainant is entitled to damages, the sum of $500 will amply compensate him for whatever damage he has suffered or may suffer, including loss of wages." We could not say that the plaintiff would not be entitled to recover for damage to his reputation if he proved that damage to his reputation was in fact caused by the defendants' illegal action. Under the finding of the master we are of opinion that the plaintiff is entitled to the larger sum with interest from January 10, 1910, when his work at Wells Brothers ceased, the bill having been filed in the preceding July.

Decree accordingly.

The case was submitted on briefs.

J. M. Hallowell & F. T. Hammond for the plaintiff.

F. W. Mansfield, for the defendants.

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SUPPLEMENT.

Opinion of the Justices to the House of Representatives.

A statute, which should attempt to make it a criminal offense for any woman under the age of twenty-one years to enter a hotel or restaurant conducted by Chinese, or to be served with food or drink therein, or for the proprietor of any such hotel or restaurant to admit thereto a woman under the age of twenty-one years or to serve her with food or drink therein, would be in violation of the Fourteenth Article of the Amendments of the Constitution of the United States in denying to persons of the Chinese race "the equal protection of the laws."

A statute, which should attempt to make it a criminal offense for any woman under the age of twenty-one years to enter a hotel or restaurant conducted by Chinese, or to be served with food or drink therein, or for the proprietor of any such hotel or restaurant to admit thereto a woman under the age of twenty-one years or to serve her with food or drink therein, would not be a proper exercise of the police power.

The following order was passed by the House of Representatives on March 10, 1911, and on March 14, 1911, was transmitted to the Justices of the Supreme Judicial Court. On March 22, 1911, the Justices returned the answer which is subjoined.

Ordered, That the Justices of the Supreme Judicial Court be requested to give to the House of Representatives their opinion upon the following question:

If the Legislature is of the opinion that public order, decency and morality require that girls and young women be excluded from Chinese restaurants and hotels, is it within the constitutional power of the Legislature to enact a law making it a criminal offense for any woman under the age of twenty-one years to enter a hotel or restaurant conducted by Chinese, or to be served with food or drink therein, or for the proprietor of any such hotel or restaurant to admit thereto a woman under the age of twenty-one years or to serve her with food or drink therein?

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To the Honorable the House of Representatives of the Commonwealth of Massachusetts:

The accompanying question, upon which our opinion is required, we respectfully answer as follows:

The Fourteenth Article of the Amendments of the Constitution of the United States contains this provision: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." This language has received judicial interpretation by the Supreme Court of the United States, whose decisions upon questions arising under the federal Constitution are binding upon us. Said Mr. Justice Harlan, in *Powell* v. *Pennsylvania*, 127 U. S. 678, 684, "The main proposition advanced by the defendant is that his enjoyment upon terms of equality with all others in similar circumstances of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, is an essential part of his rights of liberty and property, as guaranteed by the Fourteenth Amendment. The court assents to this general proposition as embodying a sound principle of constitutional law." In *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369, Mr. Justice Matthews, in giving the unanimous opinion of the court, used this language: "These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws. It is accordingly enacted by § 1977 of the Revised Statutes, that 'all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.'" The case had reference to regulations whose enforcement affected peculiarly subjects of the Emperor of China, and the opinion refers to the

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treaty of November 17, 1880, between this government and China, found in 22 U. S. Sts. at Large, 826 at page 827.

Mr. Justice Field, in *Barbier* v. *Connolly*, 113 U. S. 27, 31, gives us this language in the opinion of the court: "The Fourteenth Amendment, in declaring that no State 'shall deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses. But neither the amendment — broad and comprehensive as it is — nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity." See also *In re Tiburcio Parrott*, 1 Fed. Rep. 481; *In re Lee Sing*, 43 Fed. Rep. 359.

The business of keeping a hotel or restaurant, to which the proposed legislation relates, is a necessary and proper kind of business that is entitled to the protection of the laws. It may be conducted legally or illegally, by a person of any nationality. The proposed law, without reference to the way in which it is conducted, puts a restraint upon it which might be expected very seriously to interfere with the successful management of it, whenever it is carried on by a person of a particular nationality,

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which is not put upon it when it is carried on by a person of any other race and nationality. By the strict terms of the proposed law it would be a criminal offense for a Chinese proprietor of a hotel or restaurant to permit his wife, if she was under the age of twenty-one years, or his grown up daughter of less than that age, to enter his hotel or restaurant, or to be served with food or drink therein. This is a very great interference with the liberty of the subjects of a foreign ruler, lawfully residing within the jurisdiction of this State. It is a harmful discrimination against persons of the proscribed class, founded wholly upon their race and nationality, and it plainly falls within the constitutional prohibition quoted above. It subjects Chinese to an oppressive burden that deprives them of liberty which all others enjoy, and interferes with their right to carry on business, acquire property and earn a livelihood, and denies them the protection of equal laws.

The only question that can be regarded as doubtful by anybody is that which arises on the supposition that the Legislature may be "of the opinion that public order, decency and morality require that girls and young women be excluded from Chinese restaurants and hotels." This brings us to the consideration of the police power. There is no doubt of the right and duty of the Legislature to enact laws for the promotion of public order, decency and morality. But when such legislation interferes with the exercise of personal rights, it must be directed to the prevention of real evils, in the interest of morality. This proposed legislation does not assume to forbid anything that is necessarily evil in itself, or to deal directly with any offense against order, decency or morality. There are good hotels and bad hotels, good restaurants and bad restaurants, kept by men of the Caucasian race; and there are others of both kinds kept by men of other races. This legislation does not refer to the character or condition of the hotel or restaurant that a young woman may not enter, but refers only to the nationality of the person who conducts it. The enactment of such legislation is not a proper exercise of the police power. It has no direct relation to the evil to be remedied. It forbids the entry of a young woman into the hotel or restaurant of a Chinese proprietor, even if it is a model of orderly and moral management, and it permits the entry of

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young women into a hotel or restaurant kept by an American, when it is known to be maintained in part for the promotion of immoral or criminal practices. The classification of hotels and restaurants into those that are open to young women and those that are closed to young women is not founded upon a difference that has any just or proper relation to the professed purpose of the classification. The only classification is into hotels and restaurants kept by Chinese and those kept by persons of any other nationality.

In reference to classifications made in an attempted exercise of the police power, Mr. Justice Brewer said, in *Gulf, Colorado & Santa Fé Railway* v. *Ellis*, 165 U. S. 150, 165, "It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground — some difference which bears a just and proper relation to the attempted classification — and is not a mere arbitrary selection." See also opinion by Mr. Justice Field in *Ah Kow* v. *Manan*, 5 Sawyer, 552.

The fact that a man is white, or black, or yellow is not a just and constitutional ground for making certain conduct a crime in him, when it is treated as permissible and innocent in a person of a different color.

We answer the question in the negative.

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Opinion of the Justices to the Senate.

It is within the constitutional power of the Legislature to provide that a presiding judge in granting a motion for a new trial shall file a statement setting forth fully the grounds upon which the motion is granted, and that, if it appears from the statement that the sole ground for granting the motion was that the damages awarded were either inadequate or excessive, the new trial shall be limited to the question of the amount of damages.

It is not within the constitutional power of the Legislature to provide by statute that, if a verdict for a plaintiff is set aside by the judge presiding at the trial and at a subsequent trial of the case a verdict again is returned for the plaintiff, a new trial, if granted, shall be limited to the question of damages, unless the verdict is set aside and a new trial is granted on the ground of fraud, because such a statute would be in violation of the Seventh Article of the Amendments of the Constitution of the United States and the Fifteenth Article of the Massachusetts Declaration of Rights, in impairing the right of trial by jury, which includes the power of the presiding judge to set aside the verdict and continues until a verdict is returned to which no valid objection is made, and also might be in violation of the Fourteenth Amendment of the Constitution of the United States in denying to defendants the equal protection of the laws.

On March 23, 1911, the following order was passed by the Senate, and on March 28, 1911, was transmitted to the Justices of the Supreme Judicial Court. On April 4, 1911, the Justices returned the answer which is subjoined.

Ordered, That the Justices of the Supreme Judicial Court be required to give their opinion to the Senate upon the following important questions of law:

(1) Are the provisions of Section 1 of Senate Bill No. 378, as amended by the Senate, a copy of which is transmitted herewith, now pending before the General Court, within the constitutional power of the Legislature?

(2) Is it within the constitutional power of the General Court to provide by law that if in a civil case between party and party the sole ground for the setting aside of a verdict for the plaintiff is that the verdict is excessive, or inadequate, then the new trial of said case shall be limited to the question of the amount of damages?

(3) Is it within the constitutional power of the General Court to restrict in the manner provided in Senate Bill No. 378, as amended by the Senate, a copy of which is transmitted here-

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with, now pending before the General Court, the power of the presiding judge to set aside a verdict of the jury, or successive verdicts?

SENATE NO. 378, AS AMENDED BY THE SENATE.

An Act Relative to New Trials in Jury Cases.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

Section 1. Whenever a verdict is set aside and a new trial is granted under the provisions of section one hundred and twelve of chapter one hundred and seventy-three of the Revised Laws, the justice granting the motion for the new trial shall file a statement setting forth fully the grounds upon which the motion is granted, which statement shall be a part of the record of the case. If it appears from the statement that the sole ground for granting the motion was that the damages awarded were either inadequate or excessive, then the new trial shall be limited to the question of the amount of damages.

Section 2. If a verdict rendered in behalf of a plaintiff is set aside as provided in section one of this act and at a subsequent trial of said case a verdict is again rendered in behalf of the plaintiff, a new trial, if granted, shall be limited to the question of damages, unless the verdict is set aside and a new trial is granted on the ground of fraud.

Section 3. If exceptions taken in any case are sustained by the Supreme Judicial Court, nothing in this act contained shall prevent said court from ordering a new trial of such case on the merits.

Section 4. This act shall take effect upon its passage.

To the Honorable Senate of the Commonwealth of Massachusetts:

The questions which we are to answer, a copy of which is hereto annexed, concern the right of trial by jury which is secured to all our people by the Federal Constitution and the Constitution of this Commonwealth. U. S. Const. Amendm. art. 7. Declaration of Rights, art. 15. This right, as it was understood by our ancestors, might be exercised in all actions at common

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law, as distinguished from proceedings in admiralty, in equity, in the ecclesiastical courts and in statutory proceedings not conducted in accordance with the rules of the common law. Trial by jury, at the time of the adoption of our Constitution, included not only the presence of a jury for the determination of facts, but also the supervision and guidance of a presiding judge who should direct the course of the trial, pass upon questions as to the admissibility of evidence and instruct the jury in matters of law, so that the result of the trial might establish the rights of the parties conformably to the law of the land. It included also, as a part of the power of the judge, a right, upon application of an aggrieved party, to set aside the verdict if it was rendered by the jury in disregard of their manifest duty, or under some grave mistake which if not corrected would work a miscarriage of justice. The right of the party to have the exercise of this power of the judge to set aside a verdict does not seem to have existed from the earliest times, the remedy at first having been by a process of attainder against the jury. But so long ago as 1655, Glynne, C. J., said, in *Wood* v. *Gunston*, Style, 466, in which a new trial was granted for partiality of the jury and excessive damages for a libel: "It is in the discretion of the court in some cases to grant a new trial, but this must be a judicial, and not an arbitrary discretion, and it is frequent in our books for the court to take notice of miscarriages of juries, and to grant new trials upon them." In cases of felony it was the general practice in England to give relief by a recommendation of pardon, and this right to grant new trials was not exercised by inferior courts; but that it was a part of the authorized proceedings in a trial by jury before a court of general jurisdiction was recognized long before the adoption of our Constitution.

Said the Supreme Court of the United States, speaking through Mr. Justice Gray, in *Capital Traction Co.* v. *Hof*, 174 U. S. 1, 13, "'Trial by jury,' in the primary and usual sense of the term at the common law and in the American constitutions, is not merely a trial by a jury of twelve men before an officer vested with authority to cause them to be summoned and empanelled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by a jury of twelve men, in the presence

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and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence. This proposition has been so generally admitted, and so seldom contested, that there has been little occasion for its distinct assertion. Yet there are unequivocal statements of it to be found in the books." The substance of this doctrine was recognized by this court in *Commonwealth* v. *McElhaney*, 111 Mass. 439, 441, in which the statutes are referred to and discussed. Of jurisdiction at common law it is said that, "This court, by virtue of its general jurisdiction, and independently of any special authority conferred upon it by statute, had the power to grant new trials, even in capital cases." It was referred to by Chief Justice Shaw, who wrote the leading opinion of the court, and by Mr. Justice Dewey, who wrote a dissenting opinion, in *Commonwealth* v. *Anthes*, 5 Gray, 185, 231, 241. It was fully recognized in the comparatively recent case of *Peirson* v. *Boston Elevated Railway*, 191 Mass. 223, 230. This last case also recognizes the fact which had been established long before, that trial by jury is only for the benefit of the parties litigant, and that either of them may waive his right.

We deem it the established law of this Commonwealth that the right of each party to have the assistance and protection of the presiding judge, including the power on the part of the judge to set aside the verdict for good cause, is a part of his right to a trial by jury, secured to him by the Constitution of the Commonwealth. A similar right is secured to litigants in the United States courts by the Federal Constitution. This right continues until a verdict is returned to which no valid objection is made, and which therefore settles the rights of the parties as to all matters included in it. It follows that the Legislature has no authority to enact a statute which limits or impairs this right.

The first and second questions, which relate only to the first section of the proposed act, are answered in the affirmative. In substance the section is in accordance with the general practice to grant a new trial upon the question of damages only, if the verdict is satisfactory in all particulars as a determination of the liability. This is the practice in this court when a new trial is

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granted upon exceptions which show errors of law that enter into the assessment of damages only. The requirement that a judge shall file a statement setting forth the grounds upon which the motion is granted is a reasonable regulation that does not injuriously affect the rights of either party.

The last part of this section has no application to a case where the principal and controlling grounds for granting the new trial are that the damages are excessive, and where the statement also shows that, on the question of liability, the judge is of opinion that upon the weight of the evidence the verdict should have been the other way, and that this fact is an additional reason for setting aside the verdict, although in itself alone it might not be a sufficient reason for such action.

The third question, which refers to the second section of the proposed act, requires us to consider whether the Legislature can deprive a defendant, in whose favor a motion for a new trial has been granted, of his right to have the second, or any subsequent trial, conducted to a final result, in accordance with the salutary methods secured to him by the Constitution, which include the presence of a judge who has power to set aside the verdict if justice requires it. This question must be answered in the negative. The constitutional right to a trial by jury in actions at common law continues in every case until a verdict is rendered which is so far supported by the law and the evidence that the court ought not to set it aside. The right of the party in a trial never can be diminished or impaired by the fact that there has been a previous trial of the same case which resulted in nothing that the law could approve.

Affecting this third question, there is an independent consideration under the Fourteenth Amendment of the Constitution of the United States, which we will not consider at length. Under that amendment, every person within the jurisdiction of the Commonwealth is entitled to the equal protection of the laws. Under the second section of the proposed act, there is an attempted limitation upon the power of the court to set aside a second verdict for a plaintiff upon motion of a defendant, when there is no similar limitation upon the power of the court to set aside successive verdicts for a defendant upon motion of the plaintiff. It is at least very doubtful whether the Constitution

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permits such a discrimination between the parties to a suit, in reference to their right to have a verdict set aside if it is against the law and the evidence. See *Opinion of the Justices*, *ante*, 601, communicated to the House of Representatives on March 22, 1911.

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ACCOMPLICE.

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ACTIONABLE TORT.

1. Where during certain blasting operations a large piece of rock is hurled through the air and into a house, causing a door to strike a woman and injure her, *whether* such woman has a right of action in tort against the person doing the blasting without proof of negligence, here was not decided, the case having been tried on the theory, adopted by the parties and by the presiding judge, that the gist of the action was negligence on the part of the defendant. *Driscoll* v. *Gaffey*, 102.
2. The rule that, in actions of tort for personal injuries, where it is proved that the defendant has been negligent, there nevertheless can be no recovery by the plaintiff if the negligence, without inflicting upon the plaintiff any injury "from without," causes only fright, terror, alarm, anxiety or distress of mind, is an arbitrary exception, based upon a notion of what is practicable, to the general rule allowing recovery for damages caused by negligence; and therefore a charge to the jury, before whom was being tried an action where the physical injury to the plaintiff "from without" was so slight as to leave no mark or bruise, in which it was stated in substance that it would be sufficient if the injury caused by the battery was very slight, is not objectionable because, where the injury from without is appreciable even although it be very slight, the general rule applies and the exception does not. *Ibid.*

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Husband's right of action in tort for value of medical attendance furnished wife because of injury due to defendant's negligence, see HUSBAND AND WIFE, 1.

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See EXECUTOR AND ADMINISTRATOR.

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AGENCY.

Existence of Relation.

1. In an action by a married woman against the proprietor of a market, for personal injuries received by the plaintiff from a double-pointed barbed tack, which had fastened a tag to a leg of lamb and which the defendant's servant negligently suffered to remain embedded in the leg of lamb when the tag was removed, the plaintiff testified that she was going to give a dinner party, that she gave her husband $2 and sent him for a leg of lamb, that he brought one home, and that while she was preparing it to be served at the dinner party she received the injuries from the embedded tack. The plaintiff's husband testified that he was sent by his wife for the leg of lamb, that she gave him the money with which to pay for it, that he told the defendant's salesman that his wife wanted a nice leg of lamb and that the salesman got it for him and he paid for it with the money that his wife gave him. There was evidence that the plaintiff and her husband kept house together, that he supported the plaintiff and their child and properly provided for them at all times, and that he never had suffered them to lack for any of the necessaries of life or for anything that was proper. After a verdict for the plaintiff, a bill of exceptions alleged by the defendant stated that the only question raised was whether there was sufficient evidence that the plaintiff's husband was acting as her agent to sustain the verdict. *Held*, that this court could not say that there was no evidence warranting a finding that the husband was acting as the agent of his wife, and therefore the defendant's exceptions were overruled, although *it was said* that, if it had been open upon the bill of exceptions, the verdict could have been sustained more satisfactorily on the ground of the duty of the defendant in selling the leg of lamb for food to see that nothing was suffered to remain embedded in it which would be likely to cause injury to a person preparing it to be used for food in the exercise of reasonable care. *Hunt* v. *Rhodes Brothers Co.* 30.

Evidence at trial of action by employee against employer for personal injuries, which was held to warrant finding that certain person through whose negligence plaintiff was injured was superintendent of defendant and not independent contractor, see NEGLIGENCE, 10.

Whether at trial of writ of entry on appeal from Land Court there was evidence that execution of certain deed of corporation by its treasurer was authorized by it, and effect as evidence of report of judge of Land Court finding that it was not so authorized, and of deed itself, see CORPORATION, 1, 2; DEED, 1.

Scope of Authority or Employment.

2. In an action against a railroad corporation for the breach of an alleged agreement to pay the reasonable expenses incurred by the plaintiff in the production of a guide book intended to make known the shooting and fish-

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ing regions along the line of the defendant's road, the defendant should not be allowed to ask its agent, who made a contract with the plaintiff in regard to the production of the guide book, expecting the answer "No," the question, "Did you yourself have authority to spend any money for advertising purposes?," because the question calls for a conclusion of the witness as to the effect of his relations with the defendant and not merely for facts which would show whether he had authority. *Parrot* v. *Mexican Central Railway*, 184.

3. In an action of contract against a corporation operating a railroad in a foreign country, to recover for the breach of an alleged agreement to pay the reasonable expenses incurred by the plaintiff for the production of a book to be called a sportsman's guide book of the foreign country, the plaintiff introduced evidence of an oral agreement to the effect alleged made with the plaintiff in behalf of the defendant by the defendant's general passenger agent and its passenger traffic manager in the foreign country, and the defendant contended that neither of these persons had authority to make the oral agreement sued upon. In answer of the defendant's vice president to interrogatories filed by the plaintiff, there was evidence, that the defendant's general passenger agent was held out to the public as being such an agent by the use of his name on letter heads and otherwise, that his duties "were to exercise direct charge over the work of soliciting and securing passenger traffic for the road, and to make arrangements for that purpose," that the proposed guide book was intended to "make known and popularize the hunting and fishing regions" along the line of the railroad, that the defendant, before the alleged contract with the plaintiff, had planned to publish a similar guide book at its own expense and had advertised in various newspapers and magazines, the contracts for such advertising having been made by the defendant's general passenger agent and its passenger traffic manager, and that the duties of the passenger traffic manager "were generally to supervise the work of the passenger department." There was evidence tending to show that these two men represented the defendant generally at the head of its passenger department, that their duties could not be performed properly without the frequent expenditure of substantial sums of money, and that the advertising department was included in their charge. The vice president testified in his answers that these two agents contracted for advertising and had authority to give in return for it a certain amount of free or reduced transportation over the defendant's lines, but that neither of them had authority to make any contract for any purpose that involved the expenditure of money without first having obtained special authority from an executive officer of the corporation. *Held*, that the jury might disbelieve the testimony of the vice president as to the limitation upon the authority of the two agents, or, if they believed the testimony, yet the requirement testified to that the agents should obtain permission from an executive officer before expending any money was in the nature of a secret limitation of the general authority that these agents were held out as possessing, and was not binding upon persons dealing with them in good faith in reliance upon their ostensible authority, so that there was evidence for

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the jury of the authority of the two agents to make the oral agreement relied upon by the plaintiff. *Parrot* v. *Mexican Central Railway*, 184.

4. The fact that a mortgagee of real estate, who retained in his possession the mortgage and the note secured thereby, which was overdue, gave authority to an agent to collect and receive for him the interest upon the note, does not without more tend to indicate that the agent was authorized to receive payment of the principal due upon the note; nor is it such conduct on the part of the mortgagee as would justify the owner of the equity of redemption in believing that the agent had such additional authority nor estop the mortgagee in a suit in equity against him by a subsequent owner of the equity of redemption, after the payment to the agent by the plaintiff's predecessor of the entire amount due upon the note, from setting up in defense lack of authority in the agent to receive payment of the principal. *Burnham* v. *Wilson*, 378.

5. In a suit in equity by the owner of the equity of redemption of certain real estate against the holder of a mortgage thereon, in which it appears that the principal of the note had been paid by the plaintiff's predecessor in title to one who had acted as agent for the defendant in receiving payments of interest, and the plaintiff contends that the mortgage should be discharged because the defendant held the agent out as having authority to receive payment of the principal, the plaintiff introduced, as tending to show such holding out, evidence that the agent had collected a part of the principal due on another note from another person for the defendant, but it appeared that such fact was not known to the plaintiff's predecessor when he paid to the agent the principal of the note in question. *Held*, that, not knowing such fact, the plaintiff's predecessor could not have been influenced thereby, and therefore that the evidence had no bearing on the question of ostensible authority. *Ibid.*

6. A contract in writing between an architect and one for whom the architect was supervising the construction of a building provided that the owner of the building should employ the architect "to supervise and direct the construction of said building and to make all contracts for the furnishing and erection" of it for the owner and in his behalf, that the owner should furnish at a certain hour on each Saturday "such sums of money to cover the expenditures of the preceding week as may appear to be necessary from an estimated list made up by said architect and furnished said owner before the close of business on Friday preceding," that the owner should keep in the hands of the architect a sum not greater than $100 as an "expense fund for the defraying of small incidental expenses connected with said work," and that the owner should "furnish to said architect a sum of money sufficient to pay all lumber bills and material bills within such time after the delivery of the materials as will enable the architect to take the cash discounts"; and the architect agreed "to supervise and direct the construction of said house in accordance with said plans and specifications, to receive bids for the various parts of the work and to make contracts therefor in the name of the owner, to verify all material and labor bills and to pay for the same with money to be furnished by the owner." In an action by one who at the request of the architect furnished lumber

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which was used in the construction of the house, the owner knowing neither of the ordering, furnishing or using of the lumber, it was *held*, that the architect had authority to contract in behalf of the owner for materials used in the construction of the house. *Larivee* v. *A'Hearn*, 288.

7. If the owner of an automobile employs one, who is not in his general employ, to drive the automobile from a garage in Brookline to a shop less than a mile away in Brookline, and the driver without the knowledge or consent of the owner first takes the automobile to a square in Brookline, which is not on the way to the designated shop, has lunch, then with a friend drives the automobile to a shop in Boston six miles farther out of his way for the purpose of getting a chain for his own use, and then, just after he has turned back to go to the place to which he had been directed to go by the owner, negligently runs over a traveller on a street in Boston, who was in the exercise of due care, the owner of the automobile is not liable to the traveller for injuries thus sustained, because the act of the driver was not within the general scope of his employment. *Fleischner* v. *Durgin*, 435.

Whether, where coal dealer had instructed driver of delivery wagon to have nothing to do with removing or replacing covers to coal holes in sidewalks, but, disobeying orders, driver assists servant of owner of premises in such work and does so negligently, coal dealer is liable to one injured thereby, see NEGLIGENCE, 41.

Ratification of Acts of Agent.

8. At the trial of an action of tort for damages resulting from an alleged unlawful ejection from certain premises, the validity of a lease under which the plaintiff had been in possession of the premises was in question, and there was evidence tending to show that one, who formerly had been collecting the rent from the tenant on behalf of the person named as lessor in a former lease, at the termination of that lease, assuming to act on behalf of and in the name of the lessor, but without his authority, knowledge or consent, executed and delivered to the tenant a new lease not under seal for a further term; that thereafter the lessor, being informed by the rent collector of his act, stated to him, "I am sorry. You ought not to have done it; but, as long as you have done it, let it go"; that the rent collector continued to collect the rents from the lessee for three months, when the lessor himself collected them for three more months, telling the tenant, in answer to a statement by him that he paid his rent to the collector, that he, the lessor, was the one who told the collector to give the tenant the lease, and that he, the lessor, was the one who was entitled to the rent. *Held*, that there was evidence warranting a finding that the lessor ratified the act of the collector in making the lease; and that such oral ratification made the lease valid as against the lessor. *Kostopolos* v. *Pezzetti*, 277.

Ratification of act of agent in selling land will not be construed as ratification of his act in making certain deed if making of such deed would render carrying out of sale impossible, see CORPORATION, 1.

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Acts of officers of corporation in assenting to carrying out of agreement made by treasurer, which were held to be evidence of ratification and to warrant submission to jury of action for damages resulting from breach of agreement, see CONTRACT, 1, 19.

Liability of Principal to Agent.

Broker's commission.

9. In an action by a broker to recover a commission for making a sale of certain real estate of the defendant, where it appeared that the defendant put the property into the hands of the plaintiff for sale, that the plaintiff procured an offer which afterwards was withdrawn and that later the defendant sold the property through another broker for a lower price to the person from whom the plaintiff procured the first offer, there was conflicting evidence upon the questions whether the plaintiff's employment had been terminated in good faith by the defendant before the sale, and whether, if it had not, the plaintiff was the efficient and predominating cause of the sale or whether such cause was the second broker, and the presiding judge gave proper instructions upon these questions to the jury, who returned a verdict for the plaintiff. *Held*, that these were questions of fact and properly were left to the jury. *Woods* v. *Lowe*, 1.

In tort.

For personal injuries received while at work within scope of employment, see NEGLIGENCE, 6–19, 89; EVIDENCE, 10; PRACTICE, CIVIL, 17; EMPLOYERS' LIABILITY ACT, 1.

Liability of Owner of Horse, driven by Servant, to Injured Third Person.

Owner of horse known to him to be unsafe to be used on public streets is liable to third person for injuries resulting from horse running away when owner has loaned him, with driver, to another and horse is being driven by owner's driver, see ANIMAL, 1, 2.

Liability of Agent to Third Person.

Agent, who uses upon public street horse which he knows it is dangerous so to use, is personally liable to third person injured by horse running away, see ANIMAL, 1, 2.

General principle upon which such rule of law depends, see DANGEROUS PROPERTY, 1.

ANIMAL.

1. If the owner of a horse, who knows that the horse is an unsafe animal to be used in the public streets, lends the horse with his driver for such a use to a person who also knows the dangerous character of the horse, and if, while the horse is being driven in a public square under the direction of the borrower, he runs away and injures a traveller on the highway, who is exercising due care, the injured person has a right of action not only against the owner for his negligence in lending the horse for such a use but also against the borrower for making use of the horse

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in the public streets, knowing him to be dangerous there. *Corliss* v. *Keown*, 149.

2. If an agent of the owner of a horse, known both to the owner and the agent to be unsafe for use in the public streets, proceeds to use the horse in the public streets in conducting the business of the owner, taking that business in charge and directing the driver where and how to go, with a full knowledge of the danger of using the horse in such places, and, if the horse while being so used runs away and injures a person travelling on a public street in the exercise of due care, the agent is liable personally to the person injured. *Ibid.*

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ASSIGNMENT.

Validity.

Assignment of interest under will which attempted to place restraint upon alienation of interest, see RESTRAINT ON ALIENATION, 1.

Of Wages.

1. Under St. 1906, c. 390, which provides that no assignment of future wages shall be binding upon the employer of the assignor until a copy of it and an accurate statement of the account between the assignor and the assignee have been delivered to the employer, if an employee makes an assignment of his wages to one who does not give notice thereof to the employer until after the employer has received the notice and the copies

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required by the statute from another who, at a later date than that of the assignment previously mentioned and without knowledge of it, had received from the assignor a like assignment, the earlier assignment is rendered invalid as against the subsequent assignment and the employer is justified in paying the assignor's wages to the second assignee during the time covered by the second assignment. *Hall* v. *Boston Plate & Window Glass Co.* 328.

2. An employer who has been given the notice required by St. 1906, c. 390, § 2, of an assignment of his wages by an employee, is not bound to see to the appropriation of sums paid to the assignee in accordance with such assignment, and is justified in paying such wages to the assignee so long as the assignment continues in force in spite of the fact that, if all of the sums so paid were applied by the assignee toward payment of the debt to secure the payment of which the assignment was given, the debt would have been paid before the end of the period covered by the assignment. *Ibid.*

For Benefit of Creditors.

3. Where a general assignment for the benefit of the creditors of the assignor includes all his "estate, property and effects, real, personal and mixed, of whatever name and nature, legal and equitable, . . . also all claims, debts, choses in action, owing to him, whether now or hereafter payable, and all evidences thereof; . . . except such property as is exempt from being taken on execution by law," the exception refers only to the statutory exemptions stated in R. L. c. 177, § 34, and the instrument conveys to the assignee all the property and property rights of the assignor which the creditors could have reached for the satisfaction of their demands by any process, legal or equitable. *Blinn* v. *Dame*, 159.

4. A general assignment for the benefit of creditors, which conveys all property of the assignor legal and equitable except such as is exempt by statute from being taken on execution, and expressly includes "all claims, debts, choses in action, owing to him, whether now or hereafter payable," transfers to the assignee a right of the assignor to surrender a policy of life insurance and take the amount of the surrender value for his own benefit. *Ibid.*

5. In a policy of life insurance the insurance company agreed to pay to "the insured, his executors, administrators or assigns," the sum of $10,000 on a certain day, twenty years from the date of the policy, or if he "should die before that time, then to make said payment to" his two children named, "if they survive the insured (with power to the insured to surrender this policy to said company at any time), otherwise to the insured's executors, administrators or assigns." The policy was assignable by the insured, and contained a statement of what the expected surrender value would be at the end of successive years of the proposed insurance. The insured made a general assignment for the benefit of creditors, including all choses in action, and the assignee, having obtained possession of the policy, surrendered it to the insurance company and demanded its surrender value, against the objection of the children of the insured named in the policy and of the insured himself. In suits in equity respectively by the assignee to compel the insurance company to pay to him the surrender value of the

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policy and by the children of the insured to enjoin such payment, it was *held*, that the right of the insured to surrender the policy at any time for its surrender value was a chose in action in existence at the time of the assignment and was a valuable right of property of the assignor which passed to his assignee for the benefit of his creditors; and that it was not necessary to decide whether the interest of the children of the insured was a vested one, because, even if it was vested, it was made subject to termination by the surrender of the policy and had been so terminated by the owner of that right. *Blinn* v. *Dame*, 159.

6. An assignment for the benefit of creditors, which transferred to the assignee a right of the assignor to surrender a policy of life insurance and receive from the insurance company the amount of its surrender value, contained a covenant of further assurance, by which the assignor agreed to "make such conveyances, deeds or other instruments, and to do all such acts as shall be requisite or advisable to vest in the [assignee] all and every right, interest, and species of property of the [assignor]." In a suit in equity brought by the assignee against the insurance company and the assignor, to compel the insurance company to pay to the assignee the surrender value of the policy, it was *held*, that under his covenant of further assurance it was the duty of the assignor to execute in favor of the assignee any instrument of surrender that might be necessary to enable him to collect the surrender value of the policy from the insurance company, and that it was the duty of the insurance company upon receiving a proper surrender of the policy to pay its surrender value to the assignee. *Ibid.*

Judgment in action at law against "the goods and estate" of debtor in hands of his assignee for benefit of creditors is not judgment known to law and does not show election by judgment creditor to look to assignee personally for satisfaction of his claim, see EQUITY JURISDICTION, 5.

ATTACHMENT.

Where necessary household goods less than $300 in value are in hands of one who is served upon as trustee in writ of trustee process against owner of goods as defendant, replevin will not lie by owner to get possession of goods, see REPLEVIN, 1.

Provision of St. 1907, c. 582, § 19, excusing warehouseman from liability for refusing to deliver goods deposited with him, adversely claimed, until he has had reasonable time to ascertain validity of adverse claim, has no application to refusal of warehouseman to deliver goods attached in his hands by trustee process as property of depositor, see WAREHOUSEMAN, 1.

AUDITOR.

See PRACTICE, CIVIL, 2-4.

AUTOMOBILE.

Whether driver of automobile was acting within scope of employment at time when he was at a distance from route to place he was employed to go to and ran over traveller on highway, see AGENCY, 7.

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Action by person riding in automobile as guest of driver, where question of whether negligence should be imputed to plaintiff arose, but question whether driver was unlawfully upon highway was held not to have been raised by bill of exceptions, see NEGLIGENCE, 3; PRACTICE, CIVIL, 18.

BANK.

Liability of stockholders of savings bank, see SAVINGS BANK, 1.

BETTERMENT.

See LANDLORD AND TENANT, 4.

BILLS AND NOTES.

Validity.

1. Evidence, offered at the trial of an action by the payee against an accommodation indorser of a negotiable promissory note, tending to show that the defendant was induced to indorse the note for the purpose of compounding a criminal prosecution then pending against the maker, in the absence of evidence tending to show that the plaintiff was responsible for such inducement, is immaterial as against the plaintiff and its exclusion does not harm the defendant. *Ford* v. *Shapiro*, 108.

2. At the trial before a judge sitting without a jury of an action by the payee against an accommodation indorser of a negotiable promissory note, the defendant contended that the indorsement was illegal and void because it was procured by an abuse of criminal process and was given for the purpose of suppressing the prosecution of a crime. There was evidence tending to show that the plaintiff had given into the hands of a collection agency for collection a claim against a certain person for the amount of the purchase price of shoes, that on the advice of the attorney of the agency a complaint for larceny of the shoes was sworn out against the debtor, and that at the suggestion of the judge who was hearing the complaint that, if the debtor made restitution, he would *nol pros* the case, the debtor signed and the defendant indorsed the note in suit, and the plaintiff signed an acknowledgment of satisfaction, after which the court *nol prossed* the complaint. *Held*, that a finding for the plaintiff was warranted, since the judge might have found that the note was signed by the debtor, indorsed by the defendant and received by the plaintiff merely in settlement of a valid claim against the debtor and without any unlawful agreement having been made or unlawful pressure brought to bear by the plaintiff. *Ibid.*

Consideration.

Note which was held to have been given by maker and indorsed for accommodation by another in consideration of settlement of valid claim against maker and not to have been invalid because of any unlawful agreement

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made or unlawful pressure brought to bear by payee, although when it was delivered maker was being prosecuted by payee for larceny, see *ante*, 2.

Where bank accepts promissory note, made and indorsed for maker's accommodation by two other persons, from last indorser thereof, and surrenders therefor certain other note with same maker and indorsers, between bank and such maker and indorsers there is good consideration for new note even if bank knows of accommodation, see *post*, 3.

Accommodation Paper.

3. Where a bank takes a promissory note from the last indorser thereof, for whose accommodation the maker and a previous indorser have signed it, and surrenders in exchange a previous note then due made and indorsed by the same persons, the fact that the bank knew at the time of the transaction that the maker and the previous indorser became parties to the note for the accommodation of the last indorser does not affect its right to hold them, and between them and the bank there is a good consideration for their agreement, whatever may be the case between them and the last indorser. *Neal* v. *Scherber*, 323.

Bona Fide Purchaser.

Statement of rule of law, as to rights of holder, which applies when officer of corporation uses, to pay individual debt, corporation check payable to creditor, and of different rule which applies when officer uses for such purpose corporation check payable to himself and indorsed to creditor, see CORPORATION, 3.

As Payment.

Whether certain notes were payments was held under circumstances to be question properly left to jury, see PAYMENT, 1.

Of Unauthorized Trustee.

Upon note signed by one as trustee without authority the signer is liable in individual capacity and trust estate is not liable, see TRUST, 4.

Reformation.

Significance and bearing of certain evidence upon conduct, with regard to promissory note, of plaintiff in suit seeking its reformation, see EVIDENCE, 2, 6.

BLASTING.

See NEGLIGENCE, 42–44; ACTIONABLE TORT, 1.

BONA FIDE PURCHASER.

See CORPORATION, 3, 4.

BOND.

1. Where, in an action against the surety on a bond given to secure the faithful performance of a contract, the penalty of the bond is less in

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amount than the damages which in equity and good conscience the plaintiff is entitled to recover, interest should be allowed upon the amount of such penalty. *Rowe* v. *Peabody*, 226.

Other matters determined in same action, which was against surety upon bond of contractor who had agreed to construct conduit for water supply of town, see CONTRACT, 14, 15; MUNICIPAL CORPORATIONS, 6; DAMAGES, 1.

BROKER.

Liability of principal to broker for commission, see AGENCY, 9.

CARRIER.

Of Goods.

Right under certain circumstances of common carrier of goods to inspect packages offered for transportation in order to ascertain whether they contain intoxicating liquors, and to refuse to take packages which he is not allowed by consignor to inspect, see INTOXICATING LIQUORS, 2.

Of Passengers.

Statement by RUGG, J., of principles of law governing liability of street railway companies for personal injuries received by passengers and due, not to instrumentalities or employees of company, but to acts and conduct of other passengers or strangers, see NEGLIGENCE, 33.

In present state of transportation facilities it is not negligence for corporation operating street railway to permit passengers to come upon its cars when they already are crowded, see NEGLIGENCE, 24.

Woman voluntarily so doing assumes risk incident to crowded conditions, see NEGLIGENCE, 25.

Application of foregoing principles, see NEGLIGENCE, 26, 27.

CHARITY.

Provision in will for charitable purposes which was inoperative because purposes could not be defined or designated except from oral communications made by testator in his lifetime, see DEVISE AND LEGACY, 1; TRUST, 2.

CHICOPEE.

Certain ordinances of city of Chicopee regulating placing and maintenance of telegraph and other electric wires in public streets of city, which were held to be within authority given by R. L. c. 25, § 54; c. 26, §§ 2, 6, and not to be infringement upon exclusive jurisdiction of Congress to deal with interstate commerce; so that, when telegraph company had complied with ordinance and under its provisions had permitted city's wires to be put upon its poles for many years, it was not allowed by suit in equity to compel city to remove them, even though, under circumstances of case, presence of city's wires was technical invasion of company's rights, see MUNICIPAL CORPORATIONS, 7–9.

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CHILD.

Regarding care of person in charge of child who was injured by being run into by street car, see NEGLIGENCE, 4.

CHINESE.

Certain proposed legislation with regard to women under twenty-one years of age being admitted to or served with food or drink in hotel or restaurant conducted by Chinese, which, it was held, would be unconstitutional, see CONSTITUTIONAL LAW, 1, 8.

CITIES AND TOWNS.

See MUNICIPAL CORPORATIONS.

CLERKS OF COURTS.

Invalidity of amendment of R. L. c. 165, § 31, by St. 1906, c. 253, making certain requirements of clerks of courts in the several counties with regard to naturalization fees received by them under 34 U. S. Sts. at Large, c. 3592, and possible way of accomplishing same result by proper legislation, see CONSTITUTIONAL LAW, 5–7.

COAL HOLE.

Action for injuries resulting from plaintiff falling into coal hole in sidewalk, see NEGLIGENCE, 40, 41.

CONCEALMENT OF STOLEN PROPERTY.

1. In order to warrant a conviction under R. L. c. 208, § 51, of the crime of aiding in the concealment of stolen property knowing it to have been stolen, it is not necessary to show that there has been an actual hiding of the stolen property. It is sufficient to show that the defendant aided in so disposing of the property that it would be likely to find its way into the ordinary channels of trade and by being commingled with general merchandise lose its marks of identity. *Commonwealth* v. *Kuperstein*, 25.

CONDUCT OF TRIAL.

In actions at law, see PRACTICE, CIVIL, 9, 10, 18, 21, 22, 25–27; PLEADING, CIVIL, 1.

In criminal proceedings, see PRACTICE, CRIMINAL, 4–6; EVIDENCE, 16; HOMICIDE, 17–19.

CONFLICT OF LAWS.

Receivership proceedings against a foreign corporation doing business in this Commonwealth in which were determined questions as to relative rights of foreign and of domestic creditors, see RECEIVER, 1–4.

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There is general presumption of fact that contract to pay money for valuable consideration creates liability in all civilized countries, which, in action thereon, is sufficient to entitle plaintiff to recover upon proving facts as to making and performance of contract, without proof of law where contract was made if it was not made in this country, see EVIDENCE, 1.

Action upon policy of life insurance in which insurance company contended policy was procured by fraud and questions arose as to whether law of this Commonwealth or of another State governed, and law of such other State was not in evidence; and in which erroneous rulings of presiding judge on such questions were held not to afford to company ground for exceptions because they were too favorable to it, see PRACTICE, CIVIL, 28.

CONSPIRACY.

Civil Liability.

1. One who for many years had carried on a "bucket shop" business, representing it to be a legitimate brokerage business, realizing from his physical condition that he might die suddenly, and from the financial condition of his business that because of lack of confidence among his customers the business thereupon might fail, with an intention of causing the business to be continued after his death without interruption until claims of creditors against his estate would be barred under R. L. c. 141, § 9, falsely represented his assets to be largely beyond their real value, made a will containing provisions directing the executors to assist the business with funds after his death and associated with himself two partners who agreed to carry out these intentions. After his death the two partners did as they had agreed, and the executors of the will, who were the testator's widow, son and daughter, and who would benefit personally from the assets of the estate not being subject to be reached by creditors of the business, at first innocently but afterwards knowingly assisted in the carrying out of the scheme. At the end of two years from the giving of bonds by the executors, the partners were adjudicated bankrupt. In an action jointly against the two partners and the executors as individuals by a creditor, who had been a customer of the partnership before the death of the testator because he was deceived into thinking that theirs was a legitimate brokerage business, and who had been paid the balance due him at the testator's death and had continued a customer thereafter without knowledge of the death and because of the fraud of the testator participated in by the partners and by the widow and children as executors, it was *held*, that, not only the fraudulent partners, but also the widow and children of the testator were liable for the damages suffered by the plaintiff because of the fraudulent conspiracy jointly practised by them, and that this conclusion was not affected by the fact that the balance due to the plaintiff at the time of the testator's death had been paid, nor by the fact that payments made to the partnership by the widow and children had been made by them as executors, it appearing that such payments were made for their personal benefit. *Lantin* v. *Goodnow*, 291.

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Criminal Liability.

What constitutes.

2. A conspiracy for the attainment of an unlawful end is none the less a criminal offense because some of the means employed, although essentially dishonest, could not by themselves be made the subject of a criminal prosecution. *Commonwealth* v. *Stuart*, 563.
3. At the trial of an indictment of a number of persons for a conspiracy to obtain money by fraud, the ordinary doctrine, that false statements about the value of property by one offering it for sale or exchange are mere dealer's talk, has no application to false statements fraudulently made by one of the conspirators to a victim toward whom it could be found that he stood in a confidential relation. *Ibid.*
4. Where, in carrying out an unlawful conspiracy for obtaining property by fraud, the conspirators incidentally commit other crimes, the indictable offense of conspiracy is not merged in the subsequent specific crimes, although these may be felonies while conspiracy is only a misdemeanor. *Ibid.*

Evidence: testimony of co-conspirators.

5. At the trial of an indictment of a number of persons for a conspiracy to obtain property by fraud, members of the conspiracy are competent witnesses for the Commonwealth against their co-conspirators. *Commonwealth* v. *Stuart*, 563.

Evidence: of acts and statements of co-conspirators.

6. At the trial of an indictment of a number of persons for a conspiracy to obtain property by fraud, evidence of the acts of persons, who are shown to have joined in the conspiracy, done in furtherance of its unlawful objects is admissible against their co-conspirators, although some of the persons who did the acts were not included in the indictment. *Commonwealth* v. *Stuart*, 563.
7. At the trial of an indictment of a number of persons for a conspiracy to obtain property by fraud, evidence of acts of one of the conspirators, which tend to show the intent with which he acted and the scope and character of the conspiracy into which he had entered and in furtherance of which those particular acts could be found to have been committed, is competent, and is not to be excluded because incidentally it tends to show the commission by this conspirator of other specific crimes. *Ibid.*
8. Cases cited by SHELDON, J., upon the point, that at the trial of an indictment of a number of persons for a conspiracy to obtain property by fraud, the declarations of one of the conspirators are admissible against the others not present when they were made, although such declarations were made after the paramount object of the conspiracy had been attained by the fraudulent acquisition of the property, if they relate to the concealment and safe disposal of the property thus fraudulently obtained. *Ibid.*
9. Upon the trial of an indictment of a number of defendants for a conspiracy to steal the property of divers persons, there was proved a conspiracy in the first place to lure the owners of small stores or business

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enterprises into parting with their property in exchange for worthless promises backed by equally worthless security, and then, after the sellers thus had been cheated, to keep them at peace and inactive until the booty acquired from them had been disposed of and the conspirators thus had been enabled to enjoy the fruits of their unlawful enterprise. A certain statement of one of the conspirators, who was indicted but who died before the trial, was admitted in evidence. The statement tended to show fraud on the part of the principal conspirator and was made to the witness, who was one of the persons defrauded, after the witness had transferred his store to the conspirator who made the statement to him. The principal conspirator objected to this statement being used against him on the ground that it had been made by the deceased conspirator after the transaction between him and the defrauded witness had been completed and the object of the conspiracy as to the witness had been attained. *Held*, that an exception founded on this objection must be overruled, because the acts of conspiracy continued as stated above after the property had been acquired. *Commonwealth* v. *Stuart*, 563.

Evidence: relevancy and materiality: remoteness.

10. At the trial of an indictment of a number of persons for a conspiracy to obtain property by frand, where the conspiracy, although charged by the indictment to have existed on a certain day, was shown by the evidence to have been a continuing conspiracy extending over a period of five years, the Commonwealth may show the whole history of the conspiracy from its beginning to its consummation, including the preparations for the conspiracy made by the chief conspirator. *Commonwealth* v. *Stuart*, 563.

11. At the trial of an indictment of a number of persons for a conspiracy to obtain property by fraud, where the indictment charges that the defendants conspired together on a certain day in January, 1905, and a conspiracy is proved which began as early as 1901 and continued, with the addition of some new confederates, into the year 1906, fraudulent acts in furtherance of the conspiracy committed by its members in 1903 may be shown, the conspiracy being a continuing one. *Ibid.*

CONSTITUTIONAL LAW.

Equal Protection of the Laws.

1. A statute, which should attempt to make it a criminal offense for any woman under the age of twenty-one years to enter a hotel or restaurant conducted by Chinese, or to be served with food or drink therein, or for the proprietor of any such hotel or restaurant to admit thereto a woman under the age of twenty-one years or to serve her with food or drink therein, would be in violation of the Fourteenth Article of the Amendments of the Constitution of the United States in denying to persons of the Chinese race "the equal protection of the laws." *Opinion of the Justices*, 601.

Ex post Facto Laws.

2. The previous commission of crimes may be made an element in providing for the punishment to be imposed for a later crime and in the creation of

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certain kinds of statutory offenses without making the statute containing such provision an *ex post facto* law. *Commonwealth* v. *Ellis*, 572.

3. R. L. c. 212, § 61, is as follows: "A person who is known to be a pickpocket, thief or burglar and having no visible or lawful means of support, if found prowling around any steamboat landing, railroad depot, banking institution, broker's office, place of public amusement, auction room, store, shop, crowded thoroughfare, car or omnibus, or at any public gathering or assembly, shall be deemed a vagabond, and shall be punished by imprisonment in the house of correction for not less than four nor more than twelve months." *Held*, that this statute is constitutional, the commission of previous crimes referred to in it being used as indications to a certain extent of present character in describing the kind of person constituting a vagabond under the statute. *Ibid.*

Interstate Commerce.

4. R. L. c. 122, § 9, is not unconstitutional as a regulation of interstate commerce. *Vermilye* v. *Western Union Telegraph Co.* 401.

See also, for exemplification of reasons for above ruling, TELEGRAPH, 2.

Construction of St. 1909, c. 490, Part III. §§ 39, 56, imposing excise tax upon foreign corporations described in St. 1903, c. 437, § 58, so that it does not apply to foreign corporation which conducts within this Commonwealth as its principal function some kind of interstate commerce, and so that therefore it does not constitute interference with interstate commerce and is constitutional; and application of statute thus construed, see TAX, 2–4.

Certain police regulations with regard to telegraph and telephone companies which were held not to be violations of provisions in Constitution of United States prohibiting interference with interstate commerce, see *post*, 9; MUNICIPAL CORPORATIONS, 8.

Naturalization.

5. By art. 1, § 8, of the Constitution of the United States the making of laws relating to the naturalization of aliens is within the exclusive jurisdiction of Congress. *County of Hampden* v. *Morris*, 167.

6. The amendment of R. L. c. 165, § 81, by St. 1908, c. 253, requiring the clerks of the courts in the several counties to pay to the county treasurers the balances in their hands from the amounts received as fees in connection with the naturalization of aliens, after retaining the part of such money actually expended by them for clerical assistance, travel and other expenses while acting under the naturalization laws, is void, because it is in conflict with the law of the United States upon this subject contained in 34 U. S. Sts. at Large, c. 3592. *Ibid.*

7. *It seems*, that, if the Legislature should provide that the salaries otherwise provided by statute for the clerks of courts should be diminished by the amounts received by them, for their own benefit, under the naturalization laws of the United States, the provision might be enforced. *Ibid.*

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Police Power.

8. A statute, which should attempt to make it a criminal offense for any woman under the age of twenty-one years to enter a hotel or restaurant conducted by Chinese, or to be served with food or drink therein, or for the proprietor of any such hotel or restaurant to admit thereto a woman under the age of twenty-one years or to serve her with food or drink therein, would not be a proper exercise of the police power. *Opinion of the Justices*, 601.

9. A police regulation of a State, affecting interstate commerce only indirectly, in a field which has not been occupied by congressional legislation, is not a regulation of such commerce within the implied prohibition of the Constitution of the United States. *Postal Telegraph Cable Co.* v. *Chicopee*, 341.

Application of foregoing principle, see MUNICIPAL CORPORATIONS, 8.

R. L. c. 122, §§ 9, 10, are enactments within police power of Legislature and are not unconstitutional as interference with interstate commerce, see TELEGRAPH, 2; *ante*, 4.

Right of Trial by Jury.

10. It is within the constitutional power of the Legislature to provide that a presiding judge in granting a motion for a new trial shall file a statement setting forth fully the grounds upon which the motion is granted, and that, if it appears from the statement that the sole ground for granting the motion was that the damages awarded were either inadequate or excessive, the new trial shall be limited to the question of the amount of damages. *Opinion of the Justices*, 606.

11. It is not within the constitutional power of the Legislature to provide by statute that, if a verdict for a plaintiff is set aside by the judge presiding at the trial and at a subsequent trial of the case a verdict again is returned for the plaintiff, a new trial, if granted, shall be limited to the question of damages, unless the verdict is set aside and a new trial is granted on the ground of fraud, because such a statute would be in violation of the Seventh Article of the Amendments of the Constitution of the United States and the Fifteenth Article of the Massachusetts Declaration of Rights, in impairing the right of trial by jury, which includes the power of the presiding judge to set aside the verdict and continues until a verdict is returned to which no valid objection is made, and also might be in violation of the Fourteenth Amendment of the Constitution of the United States in denying to defendants the equal protection of the laws. *Ibid.*

Fair Trial.

So much of R. L. c. 218 as prescribes form for indictment for murder held to be constitutional, see HOMICIDE, 4.

Taxation.

Constitutionality of St. 1909, c. 527, § 8, imposing succession tax on property received by heirs of settlor under provision of certain deed of trust, see TAX, 5, 6.

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Constitutionality of statute which imposes succession tax upon promissory notes owned and possessed by testator in another State at time of death there and secured by mortgages upon real estate in this Commonwealth, see TAX, 8.

CONSTRUCTION.

Of assignment, see ASSIGNMENT, 3–6.
Of contract, see CONTRACT, 5–8; AGENCY, 6; SALE, 5; PLEDGE, 1, 2.
Of deed, see EVIDENCE, 4, 5; WAY, 1–3, 7, 8.
Of lease, see LANDLORD AND TENANT, 1–3.
Of pledge, see PLEDGE, 1, 2.
Of statute, see CONSTITUTIONAL LAW, 5–7; RAILROAD, 3; GRADE CROSSING ACTS, 1; TAX, 2, 4.
Of trusts, see TRUST, 1; DEVISE AND LEGACY, 5.
Of wills, see DEVISE AND LEGACY, 1–10.
Of certain words, see WORDS.

CONTRACT.

What constitutes.

1. At the trial of an action against a corporation for alleged arrears of salary there was evidence tending to show that the treasurer of the corporation agreed to pay the plaintiff $50 per week for a year for services to the corporation, that the plaintiff performed the services for about six months, during the first three of which the treasurer was absent, and during five months received pay at the rate of $50 per week with the knowledge and consent of the defendant's officers, and the secretary of the corporation testified that thereafter, a dispute arising, at a meeting of the directors of the defendant "it was allowed" that the plaintiff was owed the amount that he claimed, "but we wanted to try and make the best settlement we could." *Held*, that a verdict for the plaintiff was warranted. *Fallon* v. *Clifton Manuf. Co.* 491.

There is general presumption of fact that contract to pay money for valuable consideration creates liability in all civilized countries, which, in action thereon, is sufficient to entitle plaintiff to recover upon proving facts as to making and performance of contract, without proof of law of country where contract was made if it was made in foreign country, see EVIDENCE, 1.

Consideration.

2. If a person sells an insurance business for $1,800, of which $1,000 is paid in cash, and the remaining $800 is to be paid on a day named, but makes no agreement not to engage in the insurance business, and, when the second payment is made, signs a receipt in writing, by which "in consideration of" such final payment he "agrees not to engage in the insurance business for the period of five years without the consent of the purchaser," this promise is not binding for lack of a consideration, unless

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there is a consideration because the further agreement was made by the seller in order to obtain immediately the $800 due to him instead of being obliged to sue for it, which here was not considered. *Fairfield* v. *Lowry*, 352.

3. Cases cited by KNOWLTON, C. J., supporting the general rule in this Commonwealth, that a promise to pay one for doing that which he is under an existing duty to do is not binding for want of a consideration, and also cases illustrating the limitation of that rule established in this Commonwealth, that a promise to pay one for completing a contract which he has proposed to break is binding, with the remark that this limitation should not be extended beyond the cases to which it is applicable upon the recognized reasons that have been given for it. *Parrot* v. *Mexican Central Railway*, 184.

4. In an action against a railroad corporation for the breach of an alleged agreement to pay the plaintiff the reasonable expenses incurred by him for the production of a guide book intended to make known the shooting and fishing regions along the line of the defendant's railroad, the plaintiff introduced evidence of an oral agreement made in behalf of the defendant by certain of its agents who could have been found to have authority to make it, promising to pay the plaintiff the amount of the expenses in question. There also was evidence that at the time this alleged oral agreement was made there was in existence an agreement in writing made by the plaintiff with a person purporting to act for the defendant, by which the plaintiff agreed to produce the guide book in question on certain terms, but the defendant denied, both by the general denial in its answer and in the testimony of its vice president in response to interrogatories, that the person who made the agreement in writing had authority to make a contract of that character in behalf of the defendant. The defendant contended in this court that there was no consideration for the oral agreement relied upon by the plaintiff because when it was made the plaintiff already was bound to produce the guide book by the previous agreement in writing. *Held*, that it could not be assumed as matter of law that the contract in writing was made with authority from the defendant, and that, if the jury should find that the making of the contract in writing was not so authorized, they might find that an oral agreement was made later which adopted and included the provisions that previously had been reduced to writing, and that then for the first time a binding agreement was made between the plaintiff and the defendant's representatives acting with authority from the defendant, so that there would be no question of want of consideration. *Ibid.*

Whether modification of certain building contract was supported by good consideration, see *post*, 9.

Where bank accepts promissory note, made and indorsed for maker's accommodation by two other persons, from last indorser thereof, and surrenders therefor certain other note with same maker and indorsers, between bank and such maker and indorsers there is good consideration for new note even if bank knew of accommodation, see BILLS AND NOTES, 3.

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Construction.

5. A contract in writing to do certain work in remodelling certain houses to the "perfect satisfaction" of the owner, means that the work shall be performed in such a manner that a reasonable man ought to be satisfied with it. *Tobin* v. *Kells*, 304.
6. Two corporations, which were engaged in producing a cutting press for dieing out uppers of boots and shoes, made an agreement in writing concerning a machine then in process of construction embodying the invention and improvements of a certain inventor, as follows: "Each of the aforesaid companies is to pay one half of all expenses incurred in the making of the experimental machine and any further machines which they may mutually agree upon, and the cost of obtaining patents, etc., and each is to own an undivided half interest in the machines, patents, etc., and neither company is to sell, lease, grant licenses to use, or otherwise dispose of, or make use of its half interest without the written consent of the other company." *Held*, that this contract covered and established the rights of the parties to the invention itself and to the application for a patent as well as to the patent when that should have been obtained, that the subject matter of the agreement was not limited to the experimental machine mentioned, and that the agreement could not be regarded as merely a license. *Richardson Shoe Machinery Co.* v. *Essex Machine Co.* 219.
7. A contract for the purchase and sale of a gas engine contained an agreement on the part of the seller that the engine should be of the capacity of fifty-five horse power with an overload of ten per cent. In an action by the buyer against the seller for an alleged breach of the contract in supplying an engine of less power than required by the contract, it appeared that the engine delivered to the plaintiff had a gasoline attachment and was designed for use either with natural gas for fuel or arranged, as this one was, with gasoline fuel. It appeared that an engine which would develop fifty-five horse power and a ten per cent overload with natural or illuminating gas would develop much less power with gasoline. The contract provided that the engine should be "arranged for gasoline fuel," and no other fuel was referred to in the contract. It was testified without objection and recited in the bill of exceptions that "the only fuel contemplated by the parties to be used by the plaintiff in the operation of the engine was gasoline." *Held*, that the contract was not for a gas engine of fifty-five horse power warranted to develop an overload of ten per cent, but for a gas engine that would develop fifty-five horse power and an overload of ten per cent with gasoline fuel, and that a ruling to that effect was correct. *Saco Brick Co.* v. *J. P. Eustis Manuf. Co.* 312.
8. A salesman made with a corporation a contract in writing for employment, the contract containing the following provision as to its termination: "Either party may . . . terminate this agreement, by giving to the other party, sixty days' notice in writing, and accompanying such notice by a signed statement of the cause for terminating the agreement, said statement of cause to bear the written indorsement of T. and B. . . . that they are informed of the facts referred to in the cause set forth, and con-

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sider them sufficient justification for the termination of the agreement under this provision." The corporation made a formal statement in writing to T. and B. of alleged "insolence and insubordination" on the part of the salesman, and the salesman also made to them a statement in writing regarding the matter. Thereafter the corporation gave to the salesman sixty days' notice in writing of the termination of the contract for "insolence and insubordination," accompanied by a written indorsement by T. and B. stating, "We are informed of the facts referred to in the causes above set forth for the termination of the contract . . . and consider them sufficient justification for the termination of said agreement." There was no fraud or mistake which prevented T. and B. from exercising their judgment fairly. In an action by the salesman against the corporation for breach of the contract, the salesman contended that the contract could not be terminated without an indorsement in writing by T. and B. which should not be made until after the charges had been formally heard by them in a judicial manner. *Held*, that such formal hearing was not necessary under the provisions of the contract; and that everything necessary effectually to terminate the contract had been done. *McGurk* v. *Standard Plate Glass Co.* 583.

Construction of contract of sale according to understanding of trade, see SALE, 1.

Construction of agreement relating to pledge of negotiable securities with regard to power of pledgee to dispose of securities, see PLEDGE, 1, 2.

Construction of contract of sale, which was held not to include agreement by seller with regard to engaging again in same business, see SALE, 5.

Construction of contract of architect with owner of building being constructed, from which it was held that architect had authority to order materials for building on behalf of owner, see AGENCY, 6.

Modification.

9. In an action on an account annexed for labor and materials furnished by the plaintiff to the defendant in the remodelling of certain houses, the defendant contended that the plaintiff could not recover because he had not completed his contract, and the plaintiff contended that he was prevented from doing so by the wrongful conduct of the defendant. The plaintiff testified that, shortly after a contract in writing had been made for the work, he told the defendant that he had been disappointed in regard to obtaining money to use upon the work and that it would be very hard for him to keep on with the contract, and that an oral agreement then was made between the parties changing the terms of the contract in writing as to the payments to be made by the defendant, so that the defendant should pay to the plaintiff a certain sum of money each week, if the payments thus to be made did not exceed the next instalment fixed by the contract in writing, and there was evidence on which the jury could have found, in spite of evidence of the defendant to the contrary, that a modification of the contract was made, and that it was made in consequence of the plaintiff's statement to the defendant, which was understood by both

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parties to be in substance a statement that the plaintiff could not go on with his work and must abandon the contract unless it was modified. It appeared that the defendant afterwards refused to make any further payments required by the modified agreement testified to by the plaintiff, and that the plaintiff thereupon abandoned the work and sued the defendant for damages. *Held*, that, under the decisions of this court, the modification of the contract, which could have been found to have been made, could have been found to have had a good consideration and to be binding on the parties, and that therefore the jury could find that the defendant unjustifiably prevented the plaintiff from going on with his work under the contract, and thus released him from any obligation to complete it. *Tobin* v. *Kells*, 304.

Rescission.

10. In a suit in equity to compel the specific performance of an agreement in writing, if the defendant contends that the contract sought to be enforced was rescinded, but it appears that after the time of the alleged rescission the plaintiff and the defendant both treated the contract as still in force and respectively performed their obligations under it in accordance with its terms, that neither of them acted in any respect as if the contract had been done away with and that no assertion to that effect was made by the defendant until shortly before the filing of the bill, the defense of rescission cannot be sustained. *Richardson Shoe Machinery Co.* v. *Essex Machine Co.* 219.

11. In an action on an account annexed for labor and materials furnished by the plaintiff to the defendant in the remodelling of certain houses, the defendant relied on a contract in writing for the work, which the plaintiff had abandoned, and the plaintiff contended that the abandonment of the contract in writing was by mutual agreement of the parties. An auditor found and reported that the contract in writing had been annulled by the parties. The plaintiff testified that he asked the defendant whether he was going to make a payment to the plaintiff in accordance with an oral agreement modifying the terms of the original contract, that the defendant said "No," whereupon the plaintiff said that under the circumstances all he could do was to quit, to which the defendant replied, "Quit and be damned," and that thereupon the plaintiff did quit and brought his action. *Held*, that the finding of the auditor was *prima facie* evidence on which the jury had a right to find that the contract in writing was rescinded, and that they could make the same finding upon the testimony of the plaintiff, as an assent by the defendant to the plaintiff's proposition to abandon the work would be sufficient although given angrily and with an oath. *Tobin* v. *Kells*, 304.

Termination.

Construction of contract with regard to method of termination provided by it, and whether certain acts of one of parties resulted in termination, see *ante*, 8.

Performance and Breach.

12. In an action against a railroad corporation for the breach of an alleged agreement to pay the reasonable expenses incurred by the plaintiff in the

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production of a guide book intended to make known the shooting and fishing regions along the line of the defendant's railroad, the defendant contended that the plaintiff could not recover because he had not completed the performance of his contract. There was evidence that the defendant agreed to provide for the expenses incurred by the plaintiff in the prosecution of the work, that an agent of the defendant, with authority to do so, told the plaintiff to send the bill for his personal expenses to him, that the plaintiff incurred large expenses, and that the defendant, although requested, refused to pay the plaintiff any money and denied its liability to pay anything or to make any provision for the payment of the expenses. *Held*, that the acts of the defendant justified the plaintiff in refusing to go on with his contract and suing the defendant for damages. *Parrot* v. *Mexican Central Railway*, 184.

13. In an action for the alleged breach of a contract by which the defendant agreed to furnish the plaintiff with an engine which would develop with gasoline fuel a stipulated horse power, the defendant contended that the reason that the engine did not furnish the horse power stipulated in the contract was that the plaintiff failed to build the foundation for the engine in the manner specified in a certain blue print. There was no evidence and no contention that the plaintiff had not acted in good faith in building the foundation which he furnished. The defendant asked the presiding judge to rule that the fact that the plaintiff did not build such a foundation as the contract called for prevented his recovery in the action. The judge refused to give this ruling, and instead of it instructed the jury that, if the foundation furnished by the plaintiff "was just as good as that specified in the blue print," a failure of the foundation to accord with the specifications was not a defense to the action. *Held*, that, assuming in favor of the defendant that the blue print and the foundation plan constituted a part of the contract and that it was intended and expected by the defendant that the foundation should be built by the plaintiff as therein specified, yet the building by the plaintiff of the foundation specified in the blue print was not a condition precedent to the defendant's undertaking that the engine when placed upon it and properly connected should develop with gasoline fuel the stipulated horse power, and that the instruction of the judge was at the least sufficiently favorable to the defendant. *Saco Brick Co.* v. *J. P. Eustis Manuf. Co.* 312.

14. One who contracts absolutely to do a certain thing which is lawful is not to be excused for non-performance merely because performance originally was or has become impossible. *Rowe* v. *Peabody*, 226.

15. A contractor agreed in writing with a town to construct a tunnel of the length of fifteen hundred and fifty feet to hold a masonry conduit thirty inches in diameter "by the use of timber props, roof supports and lagging." The specifications contained the statement that the underground plot had not been investigated and that the committee acting for the town expressly denied any responsibility for its character. The contract provided that the contractor should bear all loss resulting to him from the character of the work or because of the nature of the ground being "different from what was estimated or expected." The character of the soil

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through which the tunnel was to be constructed proved to be such that the construction of the tunnel was impossible unless at a cost to the contractor greatly exceeding the contract price. The contractor on discovering the difficulties refused to perform his contract. *Held*, that the practical impossibility of the performance of the contract did not excuse the contractor from his obligation to construct the tunnel according to the specifications for the price named, and that he must respond in damages for his failure to do so. *Ibid.*

What are proper damages in such case, see DAMAGES, 1.

Suits for specific performance of contracts, see EQUITY JURISDICTION, 2–4.

Whether Collateral or Original.

See FRAUDS, STATUTE OF, 1.

In Writing.

16. If, in a suit in equity to enforce the alleged provisions of an agreement in writing, of which the language is not doubtful, evidence is admitted without objection of preliminary negotiations of the parties which afterwards were merged in the agreement in writing, the fact that such evidence was admitted without objection gives it no probative effect and it has none. *Fairfield* v. *Lowry*, 352.

Language of lease which was held not to be obscure or ambiguous and not to permit of variation by evidence of preliminary agreement to make lease, see LANDLORD AND TENANT, 2.

Implied.

In law.

17. Vickery *v.* Ritchie, 202 Mass. 247, affirmed. *Vickery* v. *Ritchie*, 318.

18. In an action by a builder against a landowner for the value of labor and materials furnished by the plaintiff in the construction of a building on the defendant's land at his request, it appeared that the plaintiff and the defendant, being deceived by a fraudulent architect, supposed until the building was completed that they had made a contract for its construction, that the architect fraudulently had procured and delivered to the plaintiff and to the defendant what purported to be duplicate originals of a contract for the construction of the building, that in the instrument held by the plaintiff the price was stated to be $33,000 and in that held by the defendant it was stated to be $23,000. The defendant asked for a ruling that the defendant was "entitled to a credit of $1,600 for late completion," founding this claim upon a provision of the supposed contract that the plaintiff should pay $10 a day for all time after the date at which the contract was to be completed until it was in fact completed. *Held*, that there was no foundation for the defendant's claim of this credit, as no contract containing the provision relied upon ever took effect between the parties, and that the only question to be determined was the value of the labor and materials furnished by the plaintiff at the time when and the place where they passed to the ownership of the defendant. *Ibid.*

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In fact.

19. At the trial of an action against a corporation upon a *quantum meruit* for bringing about the sale of some of the capital stock of the defendant, there was evidence that the treasurer of the defendant employed a broker to obtain a purchaser of capital stock, to whom a purchaser applied, that the broker requested some one connected with the defendant to take the matter up with the purchaser and that the treasurer asked the plaintiff to do so, stating to the plaintiff that he would be "well paid for it." The plaintiff did as requested, the sale was made, and the broker was paid a commission. There also was evidence that, a controversy arising as to whether the plaintiff should be paid anything, the matter was brought before the defendant's board of directors who left it to the secretary of the defendant "to settle," the secretary testifying that "it was allowed that we owed him this amount." *Held*, that there was evidence for the jury on the question of the defendant's liability. *Fallon* v. *Clifton Manuf. Co.* 491.

Building Contract.

Construction of meaning of requirement in building contract that work should be done to "perfect satisfaction" of owner, and consideration of whether contract was modified or rescinded, see *ante*, 5, 9, 11.

Custom of Trade.

Construction of contract of sale according to understanding of trade, see SALE, 1.

CONVERSION.

1. At the trial of an action of tort against a constable for the alleged conversion of goods in a store, which the defendant attached as the property of one S., if the plaintiff testifies that the goods belonged and still belong to him, that he made a conditional sale of them to S. by the terms of which the title to the goods was to remain in the plaintiff until payment was made, that the plaintiff executed an absolute bill of sale to S. and placed it in escrow to be delivered when full payment had been made, that S. entered into possession of the store and conducted the business, that later the plaintiff took possession of the store and the goods in it for a breach of a condition of a sale and employed S. as his agent to run the store thereafter, and that the plaintiff did not appear there himself except at rare intervals, and if the plaintiff admits that he had sold the store and there is testimony that S. had asserted that he was the proprietor of it, and S. himself admits that he was indebted to various New York firms and was a bankrupt, that he came to Boston at about the time he entered into possession of the store and that he was an entire stranger to the plaintiff, and if it appears that during the whole of the period under inquiry the business was conducted under an impersonal name which remained unchanged, this evidence would warrant a finding that the dealing of S. with the store as its owner represented his true relation to it, and accordingly the presiding judge should refuse to order a verdict for the plaintiff and should submit to the jury

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the question whether the plaintiff has sustained the burden of proof in showing that he was the owner of the goods at the time of their attachment as the goods of S. *Cohen* v. *Longarini*, 556.

CORPORATION.

Officers and Agents.

1. Although, by accepting the purchase price paid for certain of its land, a corporation may have ratified the acts of an officer who had assumed to sell the land on its behalf, it does not thereby ratify his act in executing to the purchaser in the name of the corporation a deed, the effect of which would be to prevent the carrying out of the sale. *Bishop* v. *Burke*, 133.

2. On an appeal to the Superior Court from a judgment in a writ of entry before the repeal of St. 1905, c. 288, making it the duty of the judge of the Land Court to file a report of his findings of fact which should be *prima facie* evidence of the facts therein stated, the report of the judge of the Land Court, who had found for the tenant, stated in substance that the land in question had been conveyed by a certain corporation to an unincorporated religious society subject to a condition subsequent, that, after the condition subsequent had been broken but without the corporation's making an entry upon the land, its treasurer signed and sealed in the name of the corporation a deed of the premises to the tenant and handed the deed to him; that thereafter the unincorporated religious society gave a deed of the premises to the demandant; that subsequently the corporation by an officer duly authorized made an entry upon the land and gave a proper deed to the tenant; that, although, if the treasurer of the corporation was authorized to sign the deed in its behalf, the deed would have operated as an extinguishment of the right of entry for breach of the condition subsequent and would have given to the unincorporated society an absolute power of disposal, he found that the treasurer was not so authorized, and therefore found for the tenant. One issue framed for the jury was, whether the first deed, which purported to be that of the corporation, was authorized by it. The deed itself, purporting to be signed in the corporation's name by its treasurer and to be duly acknowledged by the treasurer as its deed, was in evidence, as well as certain votes of the executive committee of the corporation having power to dispose of the corporation's land, which in substance referred the matter of the sale of the land to the treasurer "with power." *Held*, without passing on the question whether the effect of the deed, if valid, would be that stated by the judge of the Land Court, that the issue as to whether the deed in question was authorized by the corporation was for the jury. *Ibid.*

Use by officer of corporation's check to pay individual debt, see *post*, 3–5.

Case involving question whether certain officers of railroad company had authority to make certain contract for advertising purposes, see AGENCY, 3.

And whether any such contract was made, see CONTRACT, 4.

Acts of officers of corporation in assenting to carrying out of agreement made by treasurer, which were held to be evidence of ratification and to

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warrant submission to jury of action for damages resulting from breach of agreement, see CONTRACT, 1, 19.

Use by Officer of Corporation Check to pay Individual Debt.

3. Statement by LORING, J., of the rule of law, which applies when a negotiable instrument of a corporation, the payee of which is a creditor of the officer or agent of the corporation who signed the instrument in the corporation's behalf, is used by such officer or agent to pay his individual debt to the payee, the rule being that the transaction on its face is a wrongful appropriation of the corporation's money and is deemed bad until it is shown to be good, so that the rights of the creditor depend upon whether or not the transaction is in fact what it purports to be, and no question of a purchase in good faith can arise; *and also* of the different rule, which applies when the payee of such negotiable instrument of a corporation is the officer or agent who signed it on the corporation's behalf or some third person and, after being indorsed by the payee in blank, the instrument is used by the officer or agent to pay his individual debt, the rule in such case being that the transaction is good unless it is proved to be bad, so that, if the corporation proves that the use of the instrument by its officer or agent was wrongful, the rights of the creditor depend upon whether or not he acted in good faith in receiving the instrument. *Johnson & Kettell Co.* v. *Longley Luncheon Co.* 52.

4. In an action against a corporation upon an account annexed for goods sold and delivered, the defendant pleaded merely a general denial and payment. At the trial before a judge without a jury it appeared that at one time both the corporation and its treasurer were debtors of the plaintiff on separate accounts and, against the objection and subject to an exception by the plaintiff, the defendant was allowed to show that the defendant's treasurer had sent to the plaintiff checks made payable to the plaintiff and signed by the treasurer on behalf of the corporation, with directions that they be applied in payment of the individual account of the treasurer. There was no further evidence as to whether the use of the corporation's funds by the treasurer was proper. The defendant contended that the proceeds of the checks should be applied on the corporation's account with the plaintiff, and not on the treasurer's individual account, but the judge found in substance that the plaintiff was a *bona fide* purchaser of the checks, and therefore that it was not necessary to determine whether or not the corporation authorized the treasurer so to use its funds, and found for the plaintiff without giving the credit the defendant asked for. The defendant excepted. *Held*, that, although the finding and ruling of the judge seemed to be erroneous, the defendant was not harmed thereby, because, there being no declaration in set-off, the finding was on an issue not raised by the pleadings. *Ibid.*

5. At the trial before a judge without a jury of an action against a corporation for the purchase price of certain goods, it appeared that, at a time when both the corporation and its treasurer were debtors of the plaintiff on separate accounts, the treasurer sent to the plaintiff checks of the cor-

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poration, signed by him and made out to the plaintiff as payee, with specific directions to apply them in payment of the individual account of the treasurer. No evidence was introduced to show that the use of the checks by the defendant's treasurer was proper, and the defendant, relying on the rule of law that, in the absence of such evidence under the circumstances, the creditor had no right to the checks, contended that the plaintiff should apply the proceeds thereof upon the debt of the corporation. *Held*, that, the checks not having been remitted to the plaintiff generally, but with specific directions for application to the payment of the individual debt of the treasurer, the defendant had no right to insist that they be applied upon its debt to the plaintiff, whatever its rights as to a recovery from the plaintiff of the proceeds of the checks might be. *Johnson & Kettell Co.* v. *Longley Luncheon Co.* 52.

By-Laws and Rules.

Certain rule of telegraph company which under circumstances was held not to justify company in refusing to receive and transmit certain message, see TELEGRAPH, 3.

Stockholder's Liability.

Liability of stockholders of savings bank, see SAVINGS BANK, 1.

Receivership Proceedings.

Receivership proceedings against a foreign corporation doing business in this Commonwealth in which were determined questions as to relative rights of foreign and of domestic creditors, see RECEIVER, 1–4.

Foreign.

Receivership proceedings against a foreign corporation doing business in this Commonwealth in which were determined questions as to relative rights of foreign and of domestic creditors, see RECEIVER, 1–4.

Taxation of certain foreign corporation doing business in this Commonwealth, which was held proper because corporation was not so engaged in interstate commerce as to deprive this Commonwealth of power to levy such tax; and principles upon which such conclusion was based, see TAX, 2–4.

COVENANT.

Whether liability of municipality to purchaser of defective tax title is under covenant in deed of collector, see MUNICIPAL CORPORATIONS, 11.

Construction of covenant in lease to put leased premises "in as good repair as they were in at the beginning of said term," see LANDLORD AND TENANT, 1–3.

Assignee for benefit of creditors of one whose life was insured by policy with surrender value was held to have right to enforce in equity covenant for further assurance contained in assignment, see ASSIGNMENT, 6.

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CUSTOM.

Construction of contract of sale according to understanding of trade, see SALE, 1.

DAMAGES.

For Property taken or damaged under Statutory Authority.

Petition for damages due to construction of sidewalk in front of petitioner's premises, which was held maintainable although order establishing grade for sidewalks had been made twelve years before, it being held properly by judge hearing case without jury that former layout had been abandoned, see WAY, 9.

In Actions of Contract.

1. In an action by a town against the surety on the bond of a contractor, who had made a contract to construct a tunnel to hold a conduit thirty inches in diameter for the waterworks of the town, which contract he afterwards had abandoned on finding the difficulties so great that the construction of the tunnel was impossible except at a cost to him greatly exceeding the contract price, it appeared, that the method of construction required by the contract was by the use of timber supports, and that after the contractor abandoned the contract the town completed the tunnel by pneumatic construction at a necessary cost of nearly $48,000 more than the contract price for the timber construction, and that it was necessary in order to use the pneumatic method of construction to make the diameter of the tunnel forty-eight inches instead of thirty inches, although the greater diameter was of no advantage to the town after the tunnel was finished. The pneumatic method of construction was essentially different from that originally contracted for, but it was the cheapest and the most expeditious method of constructing the tunnel. *Held*, that the town, not having received from the contractor the tunnel which he had agreed to furnish, was entitled to hold him and the surety on his bond liable for the necessary cost of obtaining such a tunnel in excess of the original contract price; that the town had obtained such a tunnel as it needed at the smallest possible cost, which was much less than would have been required to procure one constructed in the manner contracted for, and the fact that in doing this the town had been forced to acquire a tunnel somewhat larger than that contracted for and different in its method of construction did not diminish the damages to which the town was entitled, as the larger tunnel served the purpose of the town no better than one of the size specified in the contract would have done and it could not have been built smaller by the method of construction that was used, this method having lessened the burden of the damages for which the contractor and the surety on his bond were liable. *Rowe* v. *Peabody*, 226.

Whether, in action upon contract implied in law for labor and materials furnished by plaintiff to defendant, where both parties had been led through fraud of architect to believe that they were acting under contract in writing, defendant was entitled to certain credits, see CONTRACT, 18.

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In Action of Tort.

Of injury to business.

2. One who unlawfully was ejected by force on a June 12 from premises, of which he was in possession rightfully and where for over six years he continuously had been carrying on a business of selling fruit at retail, and whose business had been interrupted by the eviction, is entitled to such damages as directly resulted from the wrong done to him; but if it appears at the trial of an action to recover such damages that in the conduct of his business the plaintiff had closed the store during certain hours of each day while he and his men peddled fruit from wagons about the streets, and that about a month after the eviction the plaintiff had moved to a location within a few doors of the premises in question, where he continued his business, the plaintiff should not be allowed to testify as to the amount of his weekly profits for about five and a half months before the eviction unless there is some evidence to show that they afforded a fair measure of his business for the future. *Kostopolos* v. *Pezzetti*, 277.

Resulting from fraudulent sale.

Action of deceit for fraud practised by false representations in sale of mining claim, involving questions, whether plaintiff had suffered any damage and whether action was brought prematurely, see DECEIT, 1.

Damnum absque injuria.

Statement of, reason for and application of rule that there can be no recovery in action of tort for personal injuries, although it is proved that defendant has been negligent, unless plaintiff has been injured "from without." See ACTIONABLE TORT, 2; NEGLIGENCE, 44.

In Suits in Equity.

Suit for specific performance of contract which was allowed to be dismissed without prejudice to bringing of action at law for damages, or to be retained for assessment of damages only, see EQUITY JURISDICTION, 3.

Injunction was refused in suit in equity to enjoin unlawful strike, because work upon which strike was ordered had been completed by plaintiffs; but suit was retained for assessment of damages and proper elements of damage were stated, see EQUITY JURISDICTION, 14, 15.

DANGEROUS PROPERTY.

1. One who actively participates in a negligent use of dangerous property, with full knowledge of the danger to third persons, cannot avoid liability for an injury caused by such dangerous use by showing that he was not acting in his own behalf but was assisting the negligent owner as his agent or servant. *Corliss* v. *Keown*, 149.

See also ANIMAL, 1, 2.

DEATH.

Actions of tort for injuries resulting in death, see NEGLIGENCE, 6, 8, 9, 18, 19; EVIDENCE, 13.

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DECEIT.

1. At the hearing by a judge without a jury of an action of tort for deceit to recover damages for the sale of a mining claim to the plaintiff by the defendant through false and fraudulent representations, it appeared that the fraud was committed and that the mining claim was worthless; and there was evidence tending to show that because of the representations by the defendant the plaintiff had arranged with persons other than the defendant to advance for the purchase of the claim the price agreed upon between him and the defendant and that, upon receiving a deed of the claim, a corporation should be formed by the plaintiff and the persons other than the defendant, to which the plaintiff was to convey the mining claim in return for some shares of the capital stock of the corporation. There also was evidence that one of such persons paid the purchase price to the defendant, and that the defendant thereupon conveyed the mining claim to the plaintiff, the plaintiff himself paying nothing to the defendant. The defendant asked the presiding judge to rule that, if the plaintiff had advanced no money, he could recover nothing, and that the action was premature because the plaintiff had not reimbursed the third person for the money the third person had advanced to the defendant. The rulings were refused. There was a finding for the plaintiff, and the defendant alleged exceptions. *Held*, that the rulings were refused rightly; that there was evidence of substantial damage to the plaintiff because of the worthless character of the mining claim; and that the action was not brought prematurely since the damage accrued to the plaintiff as soon as he received the deed from the defendant. *Trayne* v. *Boardman*, 581.

DEED.

Execution.

1. On the question whether there was any authority for the execution and delivery of a deed, signed in the name of a corporation by its treasurer, bearing the corporation seal and acknowledged as the deed of the corporation by the treasurer, the deed itself is evidence. *Bishop* v. *Burke*, 133.

Whether at trial of writ of entry on appeal from Land Court there was evidence that execution of certain deed of corporation by its treasurer was authorized by it, and effect as evidence of report of judge of Land Court finding that it was not so authorized, and of deed itself, see CORPORATION, 1, 2; *ante*, 1.

Delivery.

2. Evidence, that the treasurer of a corporation, who was authorized to make a sale of land of the corporation, in an attempted completion of a sale of the land, handed a deed of the land to the person named as grantee therein, who retained the deed in his possession and control for more than three months, is evidence that the deed was duly delivered to such person. *Bishop* v. *Burke*, 133.

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Construction.

Construction of easement of way over certain flats between high and low water, granted in certain deed, see WAY, 1–3, 7, 8.

Testimony that certain land, conveyance of which was obtained by fraud, was in certain town, is not testimony as to contents of deed by which it was conveyed, see EVIDENCE, 4.

DEVISE AND LEGACY.

Void because Object indefinite.

1. A testamentary disposition of property cannot be made partly by parol and partly under the statute of wills, and therefore a provision in a will for charitable purposes, which cannot be defined or designated except from oral communications made by the testator in his lifetime and referred to in his will, is bad for indefiniteness. *Wilcox* v. *Attorney General*, 198.

Application of above principle, see TRUST, 2.

Life Estate.

2. A will contained the following provision: "I give to S. my adopted daughter the sum of $10,000; and to E., also my adopted daughter, $7,000; the income of which if not needed for their support, and schooling to be added to the principal during their minority; and at the age of twenty-one they to receive the income of the several amounts devised to them during the remainder of their lives; and sooner, if married before the age of twenty-one, at the time of said marriage; in case of the death of either of them before they come of age or are married, the said sum or sums to be appropriated for the establishment of an asylum in Andover for the benefit of orphans & indigent children under the direction of my trustees or executors; and in case of their death or the death of either of them, leaving children, the said amount to go to the said children." There were numerous legacies to relatives and friends of the testator, and residuary clauses disposing of all of his estate not otherwise disposed of. E. died when more than twenty-one years of age, never having married. *Held*, that by the will E. received only a right to income during her life, and in no event an absolute estate in any portion of the principal. *Clarke* v. *Andover*, 91.

As to disposition of interests in remainder in same will, see *post*, 3, 6; TRUST, 1.

Contingent Estate.

3. A will contained the following provision: "I give to S. my adopted daughter the sum of $10,000; and to E., also my adopted daughter, $7,000; the income of which if not needed for their support, and schooling to be added to the principal during their minority; and at the age of twenty-one they to receive the income of the several amounts devised to them during the remainder of their lives; and sooner, if married before the age of twenty-one, at the time of said marriage; in case of the death

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of either of them before they come of age or are married, the said sum or sums to be appropriated for the establishment of an asylum in Andover for the benefit of orphans & indigent children under the direction of my trustees or executors; and in case of their death or the death of either of them, leaving children, the said amount to go to the said children." There were numerous legacies to relatives and friends of the testator, and residuary clauses disposing of all his estate not otherwise disposed of. E. died when more than twenty-one years of age, never having married. The trustees and executors named in the will were neighbors and personal friends of the testator. *Held*, that the words "in case of the death of either of them before they come of age or are married," should be construed to mean "in case of the death of either of them both before they become of age and before they are married," so that, E. having reached twenty-one years of age before her death, although she never married, the remainder for the establishment of an asylum in Andover never took effect. *Clarke* v. *Andover*, 91.

Designation of Legatee or Beneficiary.

4. A will left certain property to be divided "in equal parts, between the Foreign board of missions of the Episcopal church, the Domestic board of the same," and three other societies and corporations. The Foreign board of missions of the Episcopal church and the Domestic board of missions of that church are different departments under the charge of different committees as official managers of a corporation named the Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America. Each of the committees has separate offices and separate treasuries and makes separate appeals to the church, and each conducts its own affairs quite independently of the other. *Held*, that the corporation, the Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America, should receive two fifths of the amount to be divided, and each of the other three societies and corporations should receive one fifth. *Clarke* v. *Andover*, 91.
5. One, who in 1863 was a hair dresser doing business on Spring Lane in Boston and was sixty-three years of age and a man of intelligence, having "the knowledge of men of that age moving about the city ordinarily," made a will which left the residue of his estate after the death of his wife to a trustees for certain purposes until the survivor of the testator's children should die either under twenty-one years of age or without issue, on the happening of which contingency, after making certain payments, the trustee was given the following direction: "All the residue and remainder of my property shall be given to the Massachusetts Hospital for diseased and wounded soldiers." The testator died in 1867, and the survivor of his children died without issue in 1908. A fund of $10,000 then was in the hands of the trustee to be disposed of. An association known as the Discharged Soldiers' Home had been established a few years before the will was made for the purpose of providing a home for sick and wounded soldiers who had been honorably discharged from the army of

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the United States, and the Legislature for several years had made appropriations to assist in its maintenance. A governor of the Commonwealth and his wife were intimate neighbors of the testator and the Governor's wife for three years immediately following the testator's death was an officer and one of the managers of the Home. That association was not in existence in 1908. The Massachusetts General Hospital was incorporated in 1810 and at the time the will was made was maintaining a hospital where diseased and wounded soldiers were treated as well as other patients, which fact was generally known. It had for some years been known and called by the name "Massachusetts Hospital," as well as by its corporate name. A single justice, who heard a bill in equity by the trustee for instructions, found among other facts that there was nothing in the case to show that the testator had had his attention called either to the Discharged Soldiers' Home or to the Massachusetts General Hospital; or that he knew anything about them, except what may be presumed to have been known by a man who lived and worked in Boston as he did. *Held*, that the words "for diseased and wounded soldiers" in the clause in question were not descriptive of the institution which was to take, but of the purpose to which the gift was to be devoted, and that the testator intended that the residue should be given to the Massachusetts General Hospital, to be held and administered by it for diseased and wounded soldiers. *Mason* v. *Massachusetts General Hospital*, 419.

Residuary Clauses.

6. A will contained a second clause, which set apart $7,000, the income of which was to be paid to the testator's adopted daughter, but made no provision for the disposition of the principal in case the adopted daughter died without ever having married and more than twenty-one years of age. A sixth clause of the will gave "the residue of" the property, "not exceeding $50,000," to a certain school, and the seventh clause provided, "If there should anything remain after satisfying the bequests before made, I order it divided" among certain institutions. The adopted daughter died when more than twenty-one years of age without ever having married. The $50,000 for the school had been provided for before her death. *Held*, that the sixth and the seventh clauses together constituted a general residuary clause, which included all property not effectually disposed of by the earlier parts of the will; and that the $7,000 in question passed to the institutions mentioned in the seventh clause. *Clarke* v. *Andover*, 91.

7. The will of a testator, who left a widow but no children, gave a large number of legacies to relations and friends, and created a trust fund of which his widow was to have the income for life. After her death there were to be paid twenty-two legacies to charities, and the residue of the fund was to be distributed as follows: "I further direct my trustees to so divide and distribute all the rest and remainder of said trust fund among the survivors of my legatees named below that each survivor shall receive such a proportional part thereof as the amount of his foregoing legacy

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bears to the sum remaining to be distributed; to wit:" Here followed the names of thirty-five persons who were relations or friends of the testator, to each of whom a legacy had been given in the preceding part of the will. The declarations and provisions of the will made it plain that the clause quoted must be construed as including in the distribution all the property of the testator not previously disposed of. *Held*, that only those persons of the thirty-five named who survived the widow of the testator were entitled to share in the residue; and that the part of the fund which each survivor would receive was to be in such proportion to the whole amount to be distributed as the amount of the legacy given to him by the preceding part of the will bore to the total amount of the legacies sharing in the distribution. *Sias* v. *Chase*, 372.

8. A testator, who left a widow but no children, gave a large number of legacies to relations and friends, and created a trust fund of which his widow was to have the income for life and out of which after her death twenty-two legacies to charities were to be paid, and then directed that the residue of such trust fund should be distributed among the survivors of thirty-five persons named who already had been made legatees in preceding parts of his will. By a codicil the testator made the following provision: "Whereas by said will I gave a legacy to each of the following named persons, to wit: [naming thirty-four persons who were legatees under his will, some of whom were named in the residuary clause and some of whom were not]. And whereas, upon mature reflection, I do not wish a legacy to any one of the persons named above to lapse by reason of his or her death prior to my decease, or for other cause I now direct that no legacy to any one of the persons above named, shall lapse, but that, if any one of those named above shall predecease me, his or her share shall be distributed as if it were his or her intestate estate." *Held*, that this provision of the codicil referred only to the legacies given to the persons named in the parts of the will preceding the residuary clause, and had no application to the final gift to the survivors of the thirty-five persons enumerated in the residuary clause. *Ibid.*

9. A codicil to a will contained the following provisions: "And whereas by my said will I gave the estate in remainder in all my real property, devised to my wife for life, to my niece C., I now modify that devise and give to her the estate in remainder only in my real property in said West Harwich, which I have long occupied as a summer residence and have been accustomed to call my 'homestead,' and which estate I inherited from my father." The will contained a residuary clause disposing of all the property of the testator not previously disposed of. *Held*, that the portion of the remainder of the testator's real estate, which by the will was to go to his niece C. but which by the clause in the codicil quoted above was separated from her share, fell into the residue of the testator's estate and was to be disposed of under the directions relating to such residue. *Ibid.*

10. The will of a testator, who left a widow but no children, gave a large number of legacies to relations and friends, and created a trust fund of which his widow was to have the income for life and which after her death was to be applied first to the payment of twenty-two legacies to charities,

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and then was to be disposed of as the final residue of her estate as follows: "I further direct my trustees to so divide and distribute all the rest and remainder of said trust fund among the survivors of my legatees named below that each survivor shall receive such a proportional part thereof as the amount of his foregoing legacy bears to the sum remaining to be distributed; to wit:" Here followed the names of thirty-five persons who were relations or friends of the testator, to each of whom a legacy had been given in the preceding part of the will. There were codicils to the will which contained additional legacies increasing the amounts given to some of the legatees. *Held*, that the term "foregoing legacy" in the residuary clause above quoted referred to the legacies in the preceding part of the will and did not include the additional legacies to some of the same legatees by the codicil, which were to be disregarded in computing the proportional parts in which the residue was to be distributed. *Sias* v. *Chase*, 372.

"Or" construed to mean "And."

See *ante*, 3.

Attempted Restraint on Alienation.

See RESTRAINT ON ALIENATION, 1.

DISTRICT COURTS.

See PRACTICE, CIVIL, 8.

DIVORCE.

See MARRIAGE AND DIVORCE.

EASEMENT.

Extent of easement of certain private right of way, see EVIDENCE, 5; WAY, 4–6.
Of way over certain flats between high and low water, granted in deed, see WAY, 1–3, 7, 8.

EAST TAUNTON STREET RAILWAY.

Special act, St. 1901, c. 205, entitled "An Act relative to the grade crossing of the Old Colony Railroad and the East Taunton Street Railway at Chace's Crossing in the city of Taunton," was held not to take that crossing out of operation of general laws, see GRADE CROSSING ACTS, 1.

ELECTION.

Whether certain acts of plaintiff, in suit in equity for reformation of promissory note, amounted to election to confirm taking of note, see EVIDENCE, 6.
Right of defendant in criminal complaint charging single offense to compel Commonwealth to elect as between two offenses of same nature which its evidence tends to prove, see PRACTICE, CRIMINAL, 1–3.
Judgment in action at law against "the goods and estate" of debtor in

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hands of his assignee for benefit of creditors is not judgment known to law and does not show election by judgment creditor to look to assignee personally for satisfaction of his claim, see EQUITY JURISDICTION, 5.

ELECTRICITY.

Certain ordinances of city of Chicopee regulating placing and maintenance of telegraph and other electric wires in public streets of city, which were held to be within authority given by R. L. c. 25, § 54; c. 26, §§ 2, 6, and not to be infringement upon exclusive jurisdiction of Congress to deal with interstate commerce; so that, when telegraph company had complied with ordinance and under its provisions had permitted city's wires to be put upon its poles for many years, it was not allowed by suit in equity to compel city to remove them, even though, under circumstances of case, presence of city's wires was technical invasion of company's rights, see MUNICIPAL CORPORATION, 7–9.

ELEVATED RAILWAY.

Elevated railway held under certain circumstances not to have invited passengers in its station to pass through cars of elevated train in order to cross pit in which train stood and to reach other side of station, see NEGLIGENCE, 5.

Liability for injury to passenger in boarding surface car in station of elevated railway company, see NEGLIGENCE, 23.

Whether surface car belonging to elevated railway company, while it is going up incline to elevated station, is "elevated train" or "elevated car" within R. L. c. 106, § 71, as amended by St. 1908, c. 420, see NEGLIGENCE, 13, 14.

ELEVATOR.

Action by employee for injuries received while riding on elevator, which could not be maintained because plaintiff was not in exercise of due care, see NEGLIGENCE, 39.

EMBEZZLEMENT.

In prosecution for larceny, bill of particulars, which sets forth facts relied on by Commonwealth without any color being added by way of conclusion of law, was held to have left Commonwealth free to show that larceny was committed, whether larceny at common law, larceny by embezzlement, larceny by obtaining property by false pretences, or larceny under definition contained in R. L. c. 208, § 26, see LARCENY, 5.

EMINENT DOMAIN.

See WAY, 9.

EMPLOYER'S LIABILITY.

See NEGLIGENCE, 6–19, 39; EVIDENCE, 10; PRACTICE, CIVIL, 17; EMPLOYERS' LIABILITY ACT, 1.

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EMPLOYERS' LIABILITY ACT.

1. In an action by a workman against his employer under R. L. c. 106, § 71, cl. 2, which requires the plaintiff, in order to recover, to show negligence of a superintendent, whose sole or principle duty is that of superintendence, or negligence of a person acting temporarily as his substitute in his absence by authority or consent of the employer, the substitute need not be shown to be a person whose sole or principal duty is that of superintendence. *Carney* v. *A. B. Clark Co.* 200.

Whether surface car belonging to elevated railway company, while it is going up incline to elevated station, is "elevated train" or "elevated car" within R. L. c. 106, § 71, as amended by St. 1908, c. 420, see NEGLIGENCE, 13, 14.

EQUITY JURISDICTION.

Laches.

1. There was no laches in the bringing in January and July of 1909 of two suits in equity seeking an accounting as to thirteen transactions occurring during a period from October, 1903, to July, 1907, as to investments and reinvestments of sums of money and securities given by three elderly women of practically no business experience to the defendant, a distant relation about thirty years of age, educated as a lawyer, with whom they had dealt from a feeling of blind and unquestioning trust and who knew and intended that they should so act. *Hawkes* v. *Lackey*, 424.

See also *post*, 8.

Estoppel.

Certain acts of mortgagee of real estate which, in suit in equity by owner of property seeking discharge of mortgage, were held not to indicate that agent was authorized to receive payment of principal of mortgage note nor to estop mortgagee from denying that agent had such authority, see AGENCY, 4, 5.

Negligence of Plaintiff.

Bill in equity which upon demurrer was held not to show such negligence on part of plaintiff as to bar suit, see *post*, 13.

Res judicata.

See RES JUDICATA, 1, 2.

Bill for Instructions.

Case where, upon consideration together of bill of executor of deceased trustee seeking instructions as to disposition of trust fund and of appeal from decree of Probate Court appointing new trustee, decree appointing new trustee was ordered vacated because it was made without giving of proper notice, and it was held that there was no occasion for appointment of new trustee because executor of deceased trustee could be given directions as to disposition of estate, see TRUST, 3; PROBATE COURT, 1.

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Injunction.

Injunction was refused in suit in equity to enjoin unlawful strike, because work upon which strike was ordered had been completed by plaintiffs; but suit was retained for assessment of damages, see *post*, 14.

Specific Performance.

2. It is settled that an application for the specific performance of any agreement is addressed to the discretion of the court, to be exercised upon equitable considerations in view of all the circumstances of the particular case. *Richardson Shoe Machinery Co.* v. *Essex Machine Co.* 219.
3. In a suit in equity brought in the Superior Court by one corporation against another to enforce the specific performance of a contract, where it appeared that, although the plaintiff had offered to do all that was required of it by the contract and the defendant had refused performance, a change in the relation of the parties to each other after the making of the contract made a decree for its specific performance inequitable, this court ordered that the bill should be dismissed without prejudice to an action at law, unless the plaintiff should request the Superior Court to retain the bill for an assessment of damages and the Superior Court should see fit to grant its request. *Ibid.*
4. In a suit in equity by one corporation against another, to compel the specific performance of an agreement in writing concerning a cutting press for dieing out uppers of boots and shoes, which then was in process of construction, embodying the invention and improvements of a certain inventor, it appeared that, at and before the time of making the agreement, the plaintiff was engaged in selling sewing machines for the manufacture of shoes, that these machines were made for the plaintiff by the defendant, and that the object of the parties in making the agreement was to obtain a machine to be manufactured by the defendant and sold by the plaintiff to the profit of both of them, and to make provision that this new machine should be manufactured and sold only by themselves and should not be available for their competitors in business, the principal one of such competitors being a certain corporation called the United Company, that afterwards the United Company became the owner of all the property of the plaintiff except the contract sought to be enforced, and also acquired and held all the capital stock of the plaintiff, so as to dominate and control its future action, and that the suit to compel specific performance of the agreement was brought in the name of the plaintiff for the benefit of the United Company. *Held*, that under the circumstances shown the enforcement of the agreement would operate in a manner different from that intended by both parties when the agreement was made, the acts of the plaintiff after its making having destroyed the common purpose of the parties, so that a specific performance ought not to be decreed. *Ibid.*

Proper decree in such suit, see *ante*, 3.

Assignee for benefit of creditors of one whose life was insured by policy

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with surrender value was held to have right to enforce in equity covenant for further assurance contained in assignment, see ASSIGNMENT, 6.

For an Accounting.

5. A judgment in an action at law recovered against "the goods and estate" of a certain debtor in the hands of his assignee for the benefit of his creditors is not a judgment known to the law, and for that reason might perhaps be treated as a nullity, but, treating it as a judgment, it does not show an election on the part of the judgment creditor to look to the assignee personally for the satisfaction of his claim, and thus is no bar to a suit in equity by such creditor against the assignee seeking an accounting for and a recovery of the sum of money in his hands alleged to belong in equity to the plaintiff. *Mayberry* v. *Sprague*, 508.
6. A bill in equity by an executor for an accounting, alleging that the defendant received $1,000 which in accordance with the terms of a certain contract he held in trust for the plaintiff's testator and which he wrongfully and fraudulently refused to turn over to the plaintiff and "wrongfully and fraudulently appropriated to his own use," states a good ground for relief, and a demurrer to it should be overruled. *Ibid.*

Suit seeking accounting and relief from results of breach of confidence by fiduciary, and reformation of promissory note which fiduciary improperly induced beneficiary to take, see *post*, 8.

To reform Promissory Note.

Suit seeking accounting and relief from results of breach of confidence by fiduciary, and reformation of promissory note which fiduciary improperly induced beneficiary to take, see *post*, 8.

To relieve from Results of Breach of Confidence by Fiduciary.

7. Wherever two persons stand in such a relation that, while the relation continues, confidence necessarily is reposed by one and the influence which naturally grows out of that confidence is possessed by the other, and the confidence is abused or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transactions could not have been impeached if no such confidential relations had existed. *Hawkes* v. *Lackey*, 424.
8. Two elderly women of intelligence and education, who knew the character and meaning of interest on money and of the time at which a note is payable but had had scarcely any business experience and were almost like children in business matters, trusted implicitly in certain business transactions a man about thirty years of age, who was a relation of theirs and for a long time had been intimate with an aunt, with whom they had lived up to the time of her death, and likewise had been trusted by her, and who had had a college and law school education and knew of the extent of their business experience and capacity. The aunt died leaving her property to her two nieces. The man at that time owed the aunt's estate

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$2,050. Knowing that the nieces would act upon his suggestion with a feeling of blind and unquestioning trust in him and would desire to accommodate him, the man, without making any false or fraudulent representation of fact in the matter, and without any coercion or inducement on his part, and also without any warning or discussion or suggestion that they should consult an attorney who he knew was acting for the aunt's estate, for his own advantage and not in the interest of the aunt's estate asked each of them to accept for her share of the debt due to the aunt's estate a ten year note for $1,025 bearing interest at four per cent, and, without considering or appreciating the possible effect of their accepting the notes, they complied with the request because of their unquestioning trust in him and of a desire to accommodate him and partly from a desire to help certain speculations which they knew the man was making and possibly to participate therein. Thereafter the women received various semi-annual payments of interest at four per cent. Three years after the giving of the note a suit was brought by one of the sisters on her own behalf and as assignee of the claims belonging to the other sister and to the estate of the aunt for an accounting and for a cancellation of the notes, and the judge who heard the case found that the women were induced to receive the payments of interest by undue influence of the defendant, and that the notes should be re-formed into demand notes carrying interest at four per cent until the filing of the bill in equity and thereafter at six per cent. *Held*, that the bill was not barred by laches and that the finding and decree of the judge were warranted. *Hawkes* v. *Lackey*, 424.

To relieve from Results of Mistake.

9. Discussion by SHELDON, J., of the exceptions to the rule that equity will not grant relief to avoid the results of a mutual mistake of law. *Reggio* v. *Warren*, 525.

10. One, who innocently has left in the hands of the trustees under a will, as part of a trust fund, money to which he legally was entitled and the payment of which he could have enforced, and in exchange therefor has received a promissory note of the trustees bearing interest at a fixed rate, which afterwards turns out to be void because the trustees had no right to make it, but which both he and the trustees believed to be valid and binding, and who on receiving the note has given to the trustees a release and discharge, running both to them and to the trust estate, from all liability except upon such note, upon discovering the invalidity of the note and filing a bill in equity against the trustees, can avoid or rescind his release and obtain the money or the part of the trust fund which was his rightful due, where it appears that the trust estate has parted with nothing of value in or by reason of the transaction and that the only effect of refusing the relief asked for will be to deprive the plaintiff of the money to which he had the lawful right and which all the parties supposed that they had secured to him by what they had done and correspondingly to enrich the trust fund at his expense and furnish for the beneficiaries in remainder a large amount of money, to which they have no claim and to which it never was intended by anybody that they should acquire any claim. *Ibid.*

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11. In a suit in equity, by a beneficiary under a will against the trustees under the same will, to rescind a release given by the plaintiff to the defendants on receiving from them a comparatively small part, of a large sum of money to which he was entitled, in cash and much the greater part of it in the form of an interest bearing promissory note, which afterwards turned out to be void because the trustees had no right to make it, the fact, that there may have been a partial consideration for the giving of the release in the comparatively small amount of money paid to the plaintiff in cash at the time that the void note for the larger amount was delivered, does not make it impossible to give relief, if the circumstances under which the note was received by the plaintiff and the release was given by him show that he otherwise is entitled to have the release rescinded. *Reggio* v. *Warren*, 525.
12. In a suit in equity, by a beneficiary under a will against the trustees under the same will, to rescind a release given by the plaintiff to the defendants on receiving from them a comparatively small part, of a large sum of money to which he was entitled, in cash and much the greater part of it in the form of an interest bearing promissory note, which afterwards turned out to be void because the trustees had no right to make it, where it appears that before the invalidity of the note was discovered the defendants had made a part payment upon it to the plaintiff, it is not necessary for the plaintiff, in order to entitle himself to a decree for the rescission of the release, to offer to return the money which he received in cash at the time he gave the release or that which was paid to him later as a part payment on the void note, as both of these sums of money belonged to him, irrespective of the validity of the note, and he need not go through the vain ceremony of repaying or offering to repay these sums, which, if repaid, it would at once become the duty of the defendants to return to him with a much larger additional sum. *Ibid.*
13. In a suit in equity seeking to set aside a release signed by the plaintiff, releasing to the trustees under a certain will all right of the plaintiff to receive any further payment under the will, under which the plaintiff was a beneficiary and also was one of three trustees, the bill alleged, that there was due to the plaintiff as a beneficiary a large sum of money, that the trustees had not the required money on hand and could not raise such a sum for immediate payment without serious loss to the trust estate, that the plaintiff and his co-trustees all believed that, under the circumstances then existing, the trustees had full power, with the consent of the plaintiff, to retain for the purposes of the trust a large part of the money due to the plaintiff and to pay to the plaintiff the amount due to him partly in cash and the larger part by a promissory note signed by the three trustees bearing interest at a stated rate, that this was done, and that the plaintiff executed the release in question to the trustees, but that afterwards, by a decision of this court, the trustees learned that the note given by them to the plaintiff was void because they had no right to make it. The plaintiff sought to to have the release which he had signed cancelled, in order that he might receive the balance of the money due to him which the trustees could not pay him lawfully upon the note. The

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defendants demurred, and contended that the bill on its face showed negligence in the plaintiff, inasmuch as he did nothing to ascertain by his own investigation the facts upon which his rights depended or to determine what his rights were but relied merely on the assurances of his co-trustees. *Held*, that it could not be said that the bill showed such negligence on the part of the plaintiff as to preclude him from obtaining relief. *Reggio* v. *Warren*, 525.

To enjoin Unlawful Strike.

14. In a suit in equity seeking an injunction to restrain an unlawful labor strike to prevent the employment of the plaintiff as foreman by a certain firm, where the bill contains also a prayer for damages, if the plaintiff proves a case entitling him to relief, but before the time for a final decree the firm in question have stopped work and have ceased to employ either foremen or workmen, there is no occasion for an injunction and the only relief that can be granted is an award of damages. *De Minico* v. *Craig*, 593.

15. In a suit in equity to enjoin an unlawful strike to prevent the employment of the plaintiff as foreman by a certain firm, with a prayer for damages, damage to the plaintiff's reputation may be a proper element of damage if he proves that damage to his reputation was in fact caused by the defendants' illegal action. *Ibid.*

As to what is unlawful strike, see LABOR UNION, 1–7.

To enjoin Wrongful and Malicious Act.

Suit in equity maintained to enjoin members of labor union from driving about streets wagon containing placard falsely stating that there was strike in progress at plaintiff's place of business, see LABOR UNION, 9.

To enjoin Enforcement of Ordinance as to Electric Wires.

Certain ordinances of the city of Chicopee regulating placing and maintenance of telegraph and other electric wires in public streets of city, which were held to be within authority given by R. L. c. 25, § 54; c. 26, §§ 2, 6, and not to be infringement upon exclusive jurisdiction of Congress to deal with interstate commerce; so that, when telegraph company had complied with ordinance and under its provision had permitted city's wires to be put upon its poles for many years, it was not allowed by suit in equity to compel city to remove them, even though, under circumstances of case, presence of city's wires was technical invasion of company's right, see MUNICIPAL CORPORATIONS, 7–9.

Unjust Enrichment.

Bill in equity by beneficiary under trust against trustees to set aside release given by plaintiff to defendants and to rescind transaction in which it was given on ground that parties were acting in transaction under mistake and that it resulted in unjust enrichment of trust, see *ante*, 10–13.

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For Rescission of Transaction.

Bill in equity by beneficiary under trust against trustees to set aside release given by plaintiff to defendants and to rescind transaction in which it was given on ground that parties were acting in transaction under mistake and that it resulted in unjust enrichment of trust, see *ante*, 10–13.

Bill of Review.

16. A bill in equity, filed by leave of court, sought a review of a suit brought against the plaintiffs to compel them to convey to the defendant certain land which had descended to them from their father, who was alleged to have procured it by a fraud upon the defendant, the review being sought because the judge who heard the original suit, after making a memorandum for a decree granting the prayers of the bill as against the plaintiffs in the bill of review, allowed the original suit to be reopened to admit another as party defendant therein and then after a further hearing dismissed the suit as to him, the plaintiffs in the bill of review alleging that the evidence which constituted the ground for such dismissal was such as would necessitate that the suit also should be dismissed as to the plaintiffs in the bill of review. At the hearing of the bill of review the plaintiffs were allowed to introduce in evidence a transcript of the proceedings at the hearing after the reopening of the original suit, which contained statements by the presiding judge substantiating the allegations of the bill of review. *Held*, that the evidence was competent and material, the bill not being confined to the correction of errors of law upon the face of the record but being one issued in the sound discretion of the court to permit the plaintiffs to show what occurred at and after the trial of the original suit which would entitle them to a reversal of the decree entered against them therein. *Mulrey* v. *Carberry*, 390.

Cross Suit.

17. A plaintiff, who in a bill in equity to compel the conveyance to him of certain real estate alleged to be held by one of the defendants for the benefit of the plaintiff asks the court to pass upon the questions involved in an ejectment process then pending, cannot object to a cross bill, which raises the same questions, on the ground that the court which first takes jurisdiction of a subject matter will hold it to the exclusion of other courts, because by asking the court in equity to consider and adjudicate the very questions thus involved he has waived whatever right he had to the application of this principle to the case, and having submitted himself to the jurisdiction of the court in equity he cannot complain. *Bassill* v. *Bassill*, 365.

Application of above principle, see EQUITY PLEADING AND PRACTICE, 1.

Interest.

18. A suit in equity was referred to a master, who in his report found a certain sum of money to be due to the plaintiff, which was made up of certain payments made to the defendant by the plaintiff and simple in-

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terest thereon. The report was confirmed and a final decree was made directing the defendant to pay to the plaintiff the aggregate amount found due by the master and interest thereon at six per cent from the date of the filing of the report. *Held*, that under R. L. c. 177, § 8, the plaintiff had a right to have interest so computed. *Hawkes* v. *Lackey*, 424.

Damages.

Suit for specific performance of contract which was allowed to be dismissed without prejudice to bringing of action at law for damages, or to be retained for assessment of damages only, see *ante*, 3.

Injunction was refused in suit in equity to enjoin unlawful strike, because work upon which strike was ordered had been completed by plaintiffs; but suit was retained for assessment of damages, and proper elements of damage were stated, see *ante*, 14, 15.

EQUITY PLEADING AND PRACTICE.

Cross Bill.

1. In a suit in equity by a husband against his wife, who held the legal title to certain real estate, and against a person to whom she had leased the real estate, the plaintiff alleged that his wife held the real estate for his benefit, and prayed for an order compelling her to convey to him the legal title. The defendants filed a cross bill praying for a decree ordering the plaintiff in the original suit to remove from and surrender the real estate in question and to desist from prosecuting further an appeal from a decree against him in an ejectment process named in the bill and in the cross bill. The plaintiff demurred to the cross bill. The trial judge overruled the demurrer to the cross bill, and made a final decree dismissing the original bill and granting to the defendants the relief prayed for in their cross bill. The plaintiff, although he did not contend that his bill was not dismissed properly on the findings of fact, yet insisted that his demurrer to the cross bill should have been sustained and that the final decree was erroneous in giving the defendants affirmative relief based upon the cross bill. *Held*, that, as the cross bill did not seek for the determination of any questions other than those raised in the original bill, it was no less within the jurisdiction of the court than that bill itself, and that the affirmative relief was granted properly to the defendants. *Bassill* v. *Bassill*, 365.

See also EQUITY JURISDICTION, 17.

Bill of Review.

Scope of bill of review and jurisdiction of court of equity regarding such bill, see EQUITY JURISDICTION, 16.

Master's Report.

2. In a suit in equity, where a master files a report containing findings for the defendant on all the points in dispute between the parties, and the plaintiff files no objections or exceptions to the report, the findings of the

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master are conclusive, and the bill must be dismissed. *Bassill* v. *Bassill*, 365.

Report by Judge.

3. Upon the report under R. L. c. 159, § 29, to this court by a judge of the Superior Court of the facts and questions of law arising in a suit in equity, this court may draw such inferences from the facts found in the report as are reasonably to be made from and are not inconsistent with any of the facts reported. *M. Steinert & Sons Co.* v. *Tagen*, 394.

Exceptions.

4. Where in a suit in equity exceptions to rulings made by the judge who heard the case are pending, the power of the judge to enter a final decree is suspended until the exceptions are disposed of. *Mayberry* v. *Sprague*, 508.

Dismissal without Prejudice.

Suit for specific performance of contract which was allowed to be dismissed without prejudice to bringing action at law for damages, or to be retained for assessment of damages only, see EQUITY JURISDICTION, 3.

Decree.

Pro confesso.

5. Where in a suit in equity the defendant fails to answer, it is right for a judge to order that the bill shall be taken *pro confesso*, and it is no reason for not making such an order, that the facts alleged show no ground for relief and do not warrant a decree, because taking the bill *pro confesso* merely means that the truth of the facts pleaded is established. *Mayberry* v. *Sprague*, 508.

Final.

6. A final decree in a suit in equity, which makes certain declarations in regard to the rights of the parties and concludes with an order that the bill be dismissed, cannot be complained of by the plaintiff on account of such declarations if he put in issue the matters upon which the declarations as to the rights of the parties are made. *Fairfield* v. *Lowry*, 352.

There can be no final decree in suit in equity while exceptions are pending, see *ante*, 4.

ESTOPPEL.

Certain acts of mortgagee of real estate which were held not to indicate that agent was authorized to receive payment of principal of mortgage note nor to estop mortgagee from denying that agent had such authority, see AGENCY, 4, 5.

EVIDENCE.

Presumptions and Burden of Proof.

1. In an action for the breach of an alleged contract, the plaintiff relied on an oral agreement to pay the plaintiff the amount of certain expenses to be incurred by him for the benefit of the defendant, which was made in the

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Republic of Mexico, a country which has not inherited the common law of England, and no evidence was introduced of what was the law in Mexico. The defendant contended that there was no presumption in regard to the law of such a foreign country, and therefore that the plaintiff could not prevail because this court could find no rule of law applicable to the case. *Held*, that there is a general presumption of fact that a contract, like that sued upon, to pay money for a valuable consideration creates a liability in all civilized countries, which is sufficient to entitle a plaintiff to recover upon proving his case as alleged, without any evidence as to the law of the place where the contract was made. *Parrot* v. *Mexican Central Railway*, 184.

2. Neither the mere fact that an elderly woman, who was the payee of a check, passed the title to it to a man who stood in a relation of confidential business adviser to her by passing it through his father, nor the fact that an attempt was made first to indorse the check to the father and then to have it indorsed by the father to the confidential adviser, is conclusive evidence that the amount of the check was lent to the father by the payee; but at most it is evidence to be considered on that point. *Hawkes* v. *Lackey*, 424.

3. In an action by the owner of a lot of land on a city street against the owner of the adjoining lot for a nuisance maintained by the defendant or continuing trespasses committed by him in maintaining foundation stones projecting into the plaintiff's land, if the defendant relies in defense upon an alleged right or license obtained from the former owner of the plaintiff's land, the burden is on the defendant to show that he had such a right or license. *Milton* v. *Puffer*, 416.

Presumption that jury follow correct instructions of judge at trial of civil action or of criminal proceeding, see PRACTICE, CIVIL, 21; PRACTICE, CRIMINAL, 9.

Proper ruling of trial judge refusing to order verdict for plaintiff in action of tort for conversion, see CONVERSION, 1; PRACTICE, CIVIL, 20.

Certain trial of indictment for murder where evidence was circumstantial and it was held that request for verdict for defendant was properly refused, see HOMICIDE, 5–7.

Case properly left to jury although strong probability that evidence of plaintiff was incredible, see NEGLIGENCE, 8.

Instruction as to burden of proof, asked for by defendant at trial of complaint for illegal sale of intoxicating liquor, which should have been given and was refused erroneously, see PRACTICE, CRIMINAL, 5.

Action for personal injuries caused by flying rock due to blasting, where defendant was held not to have ground for contention that jury were allowed to find for plaintiff by application of rule *res ipsa loquitur*, see NEGLIGENCE, 43.

Inconsistencies in evidence of Commonwealth at trial of indictment for murder, which affected only weight of evidence, see HOMICIDE, 8.

As to whether certain evidence sustained burden upon Commonwealth to prove guilt of defendant in indictment for murder which charged several ways in which crime was committed, see HOMICIDE, 9.

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Evidence, at trial of action by employee in shoe factory against employer to recover for injuries caused by breaking of needle on machine for sewing on buttons at which plaintiff was working, which was held to leave cause of accident too conjectural to warrant submission of case to jury, see NEGLIGENCE, 17.

Evidence which was held to leave conjectural certain questions bearing on whether defendant was liable in action by passenger against railroad company, see NEGLIGENCE, 38.

Upon report to this court by judge of Superior Court of facts and questions of law which arose in suit in equity, this court may draw inferences of fact from facts found in report, see EQUITY PLEADING AND PRACTICE, 3.

Whether at trial of writ of entry on appeal from Land Court there was evidence that execution of certain deed of corporation by its treasurer was authorized by it, and effect as evidence of report of judge of Land Court finding that it was not so authorized, and of deed itself, see CORPORATION, 1, 2; DEED, 1.

At hearing of motion for new trial of indictment for murder based on contention that one of jurors was insane during trial, burden of proving such contention by fair preponderance of evidence is on defendant, see HOMICIDE, 20.

Statement of rule of law, as to rights of holder of check, which applies when officer of corporation uses, to pay individual debt, corporation check payable to creditor, and of different rule which applies when officer uses for such purpose corporation check payable to himself and indorsed to creditor, and application of such rules to facts of certain action against corporation to determine what is effect of use of check by officer under first rule where no explanation of act of officer is given and both officer and corporation are debtors of payee at time check is given, see CORPORATION, 3–5.

Extrinsic affecting Writings.

4. If a witness testifies that certain land, of which a conveyance was obtained by fraud, was in a certain town, this is not testifying to the contents of the deed by which it was conveyed. *Commonwealth* v. *Stuart*, 563.

5. Where the meaning of the parties to a deed as to the nature or extent of an easement granted by it is left doubtful by the language of the instrument, evidence of the subsequent use of the premises by the parties is competent as showing their construction of the deed. *Blais* v. *Clare*, 67.

Application of foregoing rule, see WAY, 5.

Language of lease which was held not to be obscure or ambiguous and not to permit of variation by evidence of preliminary agreement to make lease, see LANDLORD AND TENANT, 2.

Evidence of negotiations preliminary to sale, tending to vary meaning of unambiguous contract of sale, although admitted without objection at certain trial, was held to have no probative effect, see CONTRACT, 16.

Admissions by Conduct.

6. The mere fact that, after an elderly and confiding woman received from a young man in place of a debt owed by him to an estate in which she was

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beneficially interested a ten year promissory note of which he was the maker and she was the payee, which was given under such circumstances as to constitute a breach of a fiduciary relation in which the maker stood toward the payee, the payee received certain payments of interest upon the note, is not conclusive evidence of an election on the part of the payee to confirm the taking of the note, but, at strongest, can amount only to an admission by her, and, like all bare admissions, is merely evidence to be considered on the question whether such election was made. *Hawkes* v. *Lackey*, 424.

Relevancy and materiality of various evidence at trial of indictment against several for conspiracy to steal, including statements of co-conspirators who had died before trial, acts of co-conspirators, whether they were included in indictment or not, evidence which also tended to show other crimes committed by various of conspirators, and evidence of whole history of crime from its preparation to its consummation, see CONSPIRACY, 3, 6–11.

Best and Secondary.

Testimony that certain land, conveyance of which was obtained by fraud, was in certain town, is not testimony as to contents of deed by which it was conveyed, see *ante*, 4.

Competency.

Certain evidence which was held to be relevant and competent at trial of bill of review, see EQUITY JURISDICTION, 16.

Evidence which was held to be incompetent to show extent of injury to business of tenant alleged to have been evicted unlawfully by landlord, see DAMAGES, 2.

Certain question which was held rightly to have been excluded at trial of indictment for murder as indirectly placing before jury opinion of writer of medical book who was not witness in case, see HOMICIDE, 11.

Relevancy and Materiality.

Certain evidence which was held to be relevant and competent at trial of bill of review, see EQUITY JURISDICTION, 16.

Relevancy and materiality of certain evidence offered at trial of indictment for murder, see HOMICIDE, 12, 13.

Evidence which was held to be relevant and material, at trial of indictment for larceny of negotiable securities given to defendant by way of pledge, to prove intent to commit crime charged, see LARCENY, 6.

Relevancy in action by passenger against street railway company of evidence as to habitual conduct of crowd at certain time and place which resulted in injury to plaintiff on certain day at that time and place, see NEGLIGENCE, 34.

Relevancy and materiality of various evidence at trial of indictment against several for conspiracy to steal, including statements of co-conspirators who had died before trial, acts of co-conspirators, whether they were included in indictment or not, evidence which also tended to show other crimes

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committed by various of conspirators, and evidence of whole history of crime from its preparation to its consummation, see CONSPIRACY, 3, 6–11.

Evidence of disposition of defendant which was held rightly to have been excluded at trial of complaint for assault and battery where defendant contended that he acted in self defense, see *post*, 17.

Certain testimony of plaintiff at trial of action against his employer for injuries received while operating machine in sausage factory, bearing upon question whether dangerous character of machine which, without instructions or warning, he was directed by employer to operate, was obvious to him, and relating to examination he made of machine after accident, which was held to be relevant, material and competent, see NEGLIGENCE, 16.

Certain evidence which, it was held, did not tend to prove acts of mortgagee of real estate which indicated ostensible authority of agent to receive payment of principal of mortgage note so as to estop mortgagee from denying that receipt of money by agent was payment of mortgage, see AGENCY, 5.

Evidence of improper pressure brought to bear upon accommodation indorser of note to induce him to sign, which was held immaterial in action by payee against such indorser because it was not shown that payee was responsible therefor, see BILLS AND NOTES, 1.

Method of using right of way for twenty-five years which was held to be relevant and material evidence on question of what was reasonable and convenient in the occupation and enjoyment of property, see WAY, 5.

Declarations of Deceased Persons.

7. Whether the provision of R. L. c. 175, § 66, that a declaration of a deceased person shall not be excluded as hearsay if a trial judge finds it to have been made under the conditions required by that section, is applicable to criminal proceedings, here was mentioned as a question which had been referred to in argument but which was not presented for decision. *Commonwealth* v. *Stuart*, 563.

Opinion: Experts.

8. In an action on a policy of life insurance, where the defense relied upon is that the policy was procured by fraud of the insured, a witness, qualified as a medical expert, who had seen the insured for a number of years and treated him at a hospital, cannot be asked the question, "Taking into consideration the condition in which you found [the insured] in March, 1901, taking into consideration what he told you about the previous history of the case, whether in your opinion he would have been insurable in October, 1900?" because the fact that the witness is an expert in matters pertaining to his profession does not qualify him as an expert in the business of insurance so that he can tell in reference to different physical conditions when a man would be insurable. *Reagan* v. *Union Mutual Life Ins. Co.* 79.

9. At the trial of a criminal case, where there is evidence which tends to prove the facts as assumed in a hypothetical question put by the Commonwealth in cross-examination to an expert witness called by the defendant

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the question, if relevant, is admissible, it being for the jury to say whether the evidence proved the facts as assumed. *Commonwealth* v. *Jordan*, 259.

10. In an action by a workman against his employer for personal injuries from being struck by a heavy plank which was being lowered by means of a derrick without the use of a tag rope, a witness qualified as an expert may be allowed to testify that he has heard the description of the derrick and of the plank that was being lowered by it, and that in his opinion the derrick, thus used without a tag rope to keep the plank from swinging in, was not a suitable appliance for hoisting. *Durant* v. *Holbrook, Cabot & Rollins Corp.* 76.

11. Certain questions, allowed by a presiding judge in the exercise of his discretion to be put to an expert, here were held not to violate the rules that the assumptions of fact upon which the opinion of an expert is asked and based should be reasonably clear, and that where certain facts are agreed and are obviously necessary as a premise to the formation of any instructive opinion upon the subject of inquiry, the question put to the expert should include such facts or at least should not be inconsistent with them. *Greene* v. *Boston Elevated Railway*, 467.

12. If a presiding judge thinks that the jury will get more help upon a matter which is the subject of expert testimony, if an expert is allowed to give his opinion upon separate matters than they would if he were required to answer a hypothetical question reciting all the facts in the case, it is within the discretion of the judge to permit this to be done. *Ibid.*

13. In an action, by the administrator of the estate of a lineman against his employer, for the conscious suffering and death of the plaintiff's intestate alleged to have been caused by a defect in a splice of a feed cable of the defendant, which when it came in contact with the end of a monkey wrench that the intestate was using created a short circuit of electricity, there was evidence that the defective splice was wound about with tape and then painted, and a witness, called by the plaintiff as an expert, was allowed to be questioned and to answer as follows: Q. "Whether or not after the tape was put in, and before the tape was painted, whether or not an inspection of the joint would disclose the opening which you have indicated, if it was there? After the paint was on, will you tell me as to whether or not inspection would tell? A. No, it would all be smooth, slicked over by the paint. — Q. I want to ask you, on a metal joint what danger, if any, there would be in a workman having one end of that monkey wrench attached to a nut, and touching with the other end of the monkey wrench a joint which was taped properly — which was taped as you have described as the usual method of taping a joint, what danger there would be of short circuiting? A. I should say it would not short circuit under those circumstances. — Q. Whether or not, doing that under such conditions would be a safe thing for a workman to do? A. I should think it would be safe, yes." The defendant, in support of its exception to the admission of this evidence, contended that it related to matters of common knowledge which were not the proper subjects of expert testimony. *Held*, that none of these questions was objectionable as relating to matters of common knowledge, but that, if the answers contained matters of common knowledge, they did

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the defendant no harm because they were right, and that the jury were entitled to consider the facts stated in them whether such facts were matters of common knowledge or were imparted by the witness. *Greene* v. *Boston Elevated Railway*, 467.

14. Where a presiding judge in the exercise of his discretion permits an expert witness to give his opinion upon separate matters instead of answering a hypothetical question reciting all the facts in the case, it is open to the opposing party to show on cross-examination of the expert that there are conceded facts in the case which have to be accounted for and which were not accounted for in the opinion given by the witness in answering the question put to him upon a single point in his direct examination. *Ibid.*

Agent's opinion as to whether he had authority to do certain act is not admissible, see AGENCY, 2.

Private opinion as to character of defendant on trial for assault and battery, and as to improbability of his committing crime charged, which was held inadmissible, see *post*, 18.

Circumstantial.

Weight of circumstantial evidence at trial of certain indictment for murder was held to be for jury, see HOMICIDE, 5.

Certain trial of indictment for murder where evidence was circumstantial and it was held that request for verdict for defendant was properly refused, see HOMICIDE, 5–7.

Admitted without Objection.

Evidence of negotiations preliminary to sale, tending to vary meaning of unambiguous contract of sale, although admitted without objection at certain trial, was held to have no probative effect, see CONTRACT, 16.

Proof of Foreign Law.

There is general presumption of fact that contract to pay money for valuable consideration creates liability in all civilized countries, which, in action thereon, is sufficient to entitle plaintiff to recover upon proving facts as to making and performance of contract, without proof in case contract was not made in this country of law of country where contract was made, see *ante*, 1.

Medical Books.

15. Medical books are not admissible in evidence at a trial for the purpose of showing the views entertained by their authors in regard to matters in issue at the trial. *Commonwealth* v. *Jordan*, 259.

Certain question held rightly to have been excluded as indirectly placing before jury opinion of writer of medical book who was not witness in case, see HOMICIDE, 11.

Of Reputation.

16. At the trial of a complaint for keeping and maintaining a tenement used for the illegal sale and the illegal keeping of intoxicating liquors, where the defendant has introduced evidence that his reputation in the community as

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to his general character is good, it cannot be said to be error for the presiding judge to allow the Commonwealth to show in rebuttal that the defendant's reputation as to being a law-abiding person in relation to the liquor law is bad; although, if such evidence is allowed to be introduced, the presiding judge must exercise great care to see that the jury do not make use of it as tending to show guilt, but use it merely to meet and nullify, so far as it may have any effect, the evidence of the defendant's good reputation. *Commonwealth* v. *Maddocks*, 152.

Questions which were held not to call for testimony as to general reputation of defendant, charged with committing assault and battery, but for private opinion of witness, and hence rightly to have been excluded, see *post*, 18.

Of Disposition.

17. At the trial of an indictment for assaulting and beating a certain person with a dangerous weapon, where the defendant contends and introduces evidence tending to show that he struck the assaulted person in self defense, it is proper to exclude, as not being competent upon the issue as to whether the defendant acted in self defense, the following questions asked of the defendant's employer, "Is the defendant a man that becomes excited quickly?" "Is the defendant a man of excitable disposition?" *Commonwealth* v. *De Vico*, 251.

18. While the defendant in a criminal case may introduce evidence regarding his good character as tending to show the improbability of his having committed the crime with which he is charged, such evidence must be limited to his general reputation in regard to the elements of character involved in the commission of the alleged offense, and the private opinion of a witness in regard to the matter is irrelevant and immaterial. Therefore, at the trial of an indictment for assaulting and beating a certain person with a dangerous weapon, it is proper to exclude the following question, asked of the defendant's employer, who was called by the defendant, "Is the defendant a man of a quarrelsome nature?" *Ibid.*

Of Intent.

Evidence which was held to be relevant and material, at trial of indictment for larceny of negotiable securities given to defendant by way of pledge, to prove intent to commit crime charged, see LARCENY, 6.

Of Motive.

19. Where it is a material question whether a certain person did a certain act, the existence of a motive on his part to do or to refrain from doing that act is relevant. *Bock* v. *Wall*, 506.

20. At the trial of a petition filed in 1906 under the mill act by an upper riparian owner for damages alleged to have been suffered by the petitioner by reason of his land being flowed by a mill dam maintained by the respondent below him, where the respondent contended that she had a right by prescription to maintain the dam at the height objected to by the petitioner, the respondent was allowed to introduce in evidence a deed by one,

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who formerly had owned the respondent's premises and adjacent land, conveying to another in 1876 the adjacent land and covenanting for himself and his heirs and assigns, for a reason stated, to maintain the dam "to at least its present height," which was the height to which the petitioner objected. *Held*, that the deed was admitted rightly as tending to show that the grantor and his successors had a motive to do what the respondent, one of the successors, contended that they had done. *Bock* v. *Wall*, 506.

Evidence of motive at trial of indictment for murder, see HOMICIDE, 14, 16.

Of Conspiracy.

Relevancy and materiality of various evidence at trial of indictment against several for conspiracy to steal, including statements of co-conspirators who had died before trial, acts of co-conspirators, whether they were included in indictment or not, evidence which also tended to show other crimes committed by various of the conspirators, and evidence of whole history of crime from its preparation to its consummation, see CONSPIRACY, 3, 6–11.

Of other Crimes than one charged in Indictment.

Relevancy and materiality of various evidence at trial of indictment against several for conspiracy to steal, including statements of co-conspirators who had died before trial, acts of co-conspirators, whether they were included in indictment or not, evidence which also tended to show other crimes committed by various of the conspirators, and evidence of whole history of crime from its preparation to its consummation, see CONSPIRACY, 3, 6–11.

Of Authority to execute Deed.

Whether at trial of writ of entry on appeal from Land Court there was evidence that execution of certain deed of corporation by its treasurer was authorized by it, and effect as evidence of report of judge of Land Court finding that it was not so authorized, and of deed itself, see CORPORATION, 1, 2; DEED, 1.

Of Defect in Appliances.

Mere breaking of hook while carrying weight less than hook of its size should carry was held to be some evidence that hook was defective, see NEGLIGENCE, 48.

Violation of Rule as Evidence of Negligence.

Violation of rule of street railway company by conductor, which was held to be evidence of negligence, see NEGLIGENCE, 36.

EXCEPTIONS.

In actions at law, see PRACTICE, CIVIL, 11–29.
In suits in equity, see EQUITY PLEADING AND PRACTICE, 4.
In criminal proceedings, see PRACTICE, CRIMINAL, 1–3, 7, 8.

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EXECUTION.

Levy.

1. To constitute a valid levy by a deputy sheriff under an execution upon real estate which previously had been attached in the action in which the execution issued, no more formal overt act is necessary than for the officer to make a memorandum for the levy on a piece of paper and to direct a clerk in his office to make the necessary copies for notice to the judgment debtor and for recording and publication and to prepare the return for the signature of the deputy sheriff. *Hunneman* v. *Phelps*, 439.

Amendment of Return of Levy.

2. At the hearing of a motion by a deputy sheriff to amend, so that it would conform to the truth, a return by him upon an execution as to a levy, so that, instead of reading that he levied upon the interest of the debtor in certain real estate as it existed on the date of the levy, it should read that he levied upon the debtor's interest as it was at the time of an attachment thereof made at the commencement of the action, there was evidence tending to show that the attachment had been made, that the execution had been handed to the deputy sheriff with an instruction to levy upon the property attached, the date of the attachment being given to him, that he then had made a memorandum for the levy on the interest of the debtor in the real estate as of the date of the attachment upon a piece of paper, which at the time of the hearing was lost, and had directed a clerk in his office to make the necessary copies for notice to the debtor and for publication and recording and to prepare the return for the signature of the deputy sheriff; that the notice given to the debtor and published in a newspaper stated the levy in accordance with the proposed amended return and that the return upon the copy of the execution filed in the registry of deeds and upon the original execution stated it as covering the debtor's interest on the later date. The judge found as a fact that the levy was made as stated in the amendment and allowed the motion. *Held*, that the action of the judge was within his power and was warranted. *Hunneman* v. *Phelps*, 439.

EXECUTOR AND ADMINISTRATOR.

Insolvent Estates.

1. R. L. c. 142, § 10, in the chapter relating to insolvent estates of deceased persons, provides that a creditor, who does not present his claim for allowance to the commissioners appointed by the Probate Court or, if no commissioners are appointed, to the court itself within the time prescribed by that court not exceeding eighteen months from the original appointment or order, shall be barred from recovering such claim, but that "if further assets of the deceased come to the hands of the executor or administrator after the decree of distribution, the claim may be proved, allowed and

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paid," as provided in that chapter for contingent claims. *Held*, that the "further assets," which a belated creditor may reach under the provision above quoted are the same as the "new assets" which such a creditor may reach under R. L. c. 141, § 11, upon a claim against the estate of a person who died solvent. *Fay* v. *Haskell*, 207.

2. The term "further assets" in R. L. c. 142, § 10, like the term "new assets" in R. L. c. 141, § 11, does not include property with which the executor or administrator has been charged in his inventory or otherwise or the property into which such property or any part thereof has been changed, nor does it include the natural increment of such property in the way of interest or otherwise. *Ibid.*

3. Under R. L. c. 142, § 10, where a creditor of the insolvent estate of a deceased person is seeking to show "further assets" in the hands of the administrator of his estate after the decree of distribution, he is not entitled to treat as such assets the balance from a former account of the administrator nor the proceeds in the hands of the administrator of a judgment recovered against a savings bank for a surplus remaining from the foreclosure of a mortgage made by the intestate, nor a sum received by the administrator for tools which had belonged to the intestate and had been included in the inventory, nor money received by the administrator as interest on a deposit in a national bank, nor damages recovered for the breach of a contract to purchase from the intestate a certain note and mortgage, although the note and mortgage had been inventoried as worthless, each of the assets enumerated being the product of a change in an original asset and not "further assets." *Ibid.*

4. In an appeal to the Superior Court from a decree of the Probate Court a creditor of the insolvent estate of a deceased person sought to show "further assets" in the hands of the administrator of his estate after the decree of distribution. A supplementary account of the administrator filed after the decree of distribution showed his receipt of certain sums from the sales of interests in two parcels of land. In neither the first account of the administrator nor in his "second and final account," filed and allowed nearly four years later, were these interests in land or the proceeds from their sale included. The administrator testified that he knew that these parcels of land belonged to the estate of his intestate some two or three months after filing the inventory and that for a long time before the decree of distribution he had been trying to negotiate a sale of them to prospective purchasers. The administrator asked the judge of the Superior Court to rule (1) that the finding should be for the administrator, (2) that after the decree of distribution no "further assets" ever came to the hands of the administrator to which the creditor became entitled, and (3) that all the property that came to the hands of the administrator after the decree of distribution was represented in the inventory filed before the decree of distribution or was known by the administrator before that decree to be property of the intestate and therefore was not "further assets" to which the creditor was entitled. The judge refused to make any of these rulings, and found for the creditor. On exceptions alleged by the administrator, it was *held*, that, although, if the statement of the adminis-

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trator in his testimony was correct, neither the interests in land nor the proceeds from their sales were "further assets," yet the judge might not have believed this testimony of the administrator, and might have concluded from all the evidence that knowledge of the interests in these two parcels of land did not come to the administrator until long after the expiration of the two years' limitation from the time of his appointment, and that under such a finding the sums thus received from the sales were "further assets"; that, therefore, neither the first nor the second ruling asked by the administrator should have been given, nor the third, because it assumed that the testimony of the administrator was true. *Fay* v. *Haskell*, 207.

Executor acting as Trustee.

Case where, on death of trustee under will, his executor sought instructions as to what disposition he should make of trust estate, and it was held that under circumstances appointment of new trustee was unnecessary, see TRUST, 8.

Individual Liability of Executors wrongfully conspiring for Individual Benefit.

In action against five persons, three of whom were executors under certain will, for fraud alleged to have been jointly practised upon plaintiff, one element of which was payment of money by executors to keep up pretense that business formerly of testator and later of other two defendants was solvent, it was held that fact that such payments were made by the three as executors did not relieve them from liability, since under circumstances payments were made for their individual benefit, see CONSPIRACY, 1.

FALSE PRETENSES.

Obtaining property by false pretenses as distinguished from larceny at common law and from larceny as described in R. L. c. 208, § 26, see LARCENY, 2–4.

In prosecution for larceny, bill of particulars, which sets forth facts relied on by Commonwealth without any color being added by way of conclusion of law, was held to have left Commonwealth free to show that larceny was committed, whether larceny at common law, larceny by embezzlement, larceny by obtaining property by false pretenses, or larceny under definition contained in R. L. c. 208, § 26, see LARCENY, 5.

FALSE REPRESENTATION.

Action of deceit for fraud practised by false representation in sale of mining claim, involving questions, whether plaintiff had suffered any damage and whether action was brought prematurely, see DECEIT, 1.

Representations by seller of matters of opinion, and not of knowledge, as to what article, which was to be made from drawings and sold to prospective purchaser, would do, were held not to invalidate sale if opinion was wrong and there was no actual fraud, see SALE, 6.

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Indictment against several for conspiracy to steal, involving various sales of land, where ordinary rule, that false statements about value of property by one offering it for sale are mere dealer's talk, was held to have no application, see CONSPIRACY, 3.
Other rulings at same trial, see CONSPIRACY, 2, 4, 5–11.

FENCE.

Maintenance of fences along right of way by railroad companies, see RAILROAD, 1–3.

FIRE.

Insurance against loss by fire, see INSURANCE, 2, 3.

FLATS.

1. Discussion by HAMMOND, J., of the rights under the colonial ordinance of 1647 of the public and of the owner of flats between high and low water mark adjacent to an arm of the sea. *Old Colony Street Railway* v. *Phillips*, 174.
Construction of easement of way over certain flats between high and low water, granted in certain deed, see WAY, 1–3, 7, 8.

FORESTER.

Respective duties of tree wardens, foresters, and park commissioners in regard to shade trees, bushes or other trees than shade trees in towns and cities, see MUNICIPAL CORPORATIONS, 4.

FRATERNAL BENEFICIARY CORPORATION.

1. The decisions of this court previously made in Skinner's Claim, in Doleac's Claim and in Dreyfus's Claim in the case of Attorney General *v.* American Legion of Honor, reported in 206 Mass. 175, 180, here were affirmed, and the principles settled by those decisions were applied to a claim, filed later under a special interlocutory decree, presenting similar facts. *Attorney General* v. *American Legion of Honor*, 586.

FRAUD.

Testimony that certain land, of which conveyance was obtained by fraud, was in certain town, is not testimony as to contents of deed by which it was conveyed, see EVIDENCE, 4.
Representations by seller of matters of opinion, and not of knowledge, as to what article, which was to be made from drawings and sold to prospective purchaser, would do, were held not to invalidate sale if opinion was wrong and there was no actual fraud, see SALE, 6.

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Fraud (*continued*).

Action of deceit for fraud practised by false representation in sale of mining claim, involving questions, whether plaintiff had suffered any damage and whether action was brought prematurely, see DECEIT, 1.

Indictment against several for conspiracy to steal, involving various sales of land, where ordinary rule, that false statements about value of property by one offering it for sale are mere dealer's talk, was held to have no application, see CONSPIRACY, 3.

Other rulings at same trial, see CONSPIRACY, 2, 4, 5–11.

Case in which it was held that there was evidence which would have warranted finding that five defendants conspired together in commission of fraud upon plaintiff, see CONSPIRACY, 1.

Action upon policy of life insurance in which insurance company contended that policy was procured by fraud and questions arose as to whether law of this Commonwealth or of another State governed and law of such other State was not in evidence; and in which erroneous rulings of presiding judge on such questions were held not to afford to defendant ground for exceptions because they were too favorable to it, see PRACTICE, CIVIL, 28.

FRAUDS, STATUTE OF.

1. In an action by one woman against another on an account annexed for board and lodging furnished by the plaintiff to a brother of the defendant upon an alleged promise of the defendant to pay for it, the defense relied upon was that the promise of the defendant was a promise to pay the debt of another under the statute of frauds of the State of New York, where the contract was made. It appeared that the statute of frauds of that State included "a special promise to answer for the debt, default or miscarriage of another person" and that this had been construed by the courts of New York to apply, like the similar provision in R. L. c. 74, § 1, to collateral and not to original promises and undertakings. The plaintiff testified that, before the board and lodging or any part of it was furnished, the defendant said to her "If you will take care of William [the defendant's brother], I will pay you when I can." This was denied by the defendant but was corroborated by other evidence of the plaintiff. The defendant introduced evidence which tended to show that her undertaking was collateral and not original in its nature. The presiding judge submitted the case to the jury, who returned a verdict for the plaintiff. *Held*, that on the conflicting evidence the case rightly was left to the jury. *Downs* v. *Perkin*, 409.

GOOD WILL.

Certain contract of sale of business which was held not to include agreement by seller with regard to engaging in same business, see SALE, 4, 5.

GOVERNOR.

1. The Supreme Judicial Court has no power to issue a writ of mandamus addressed to the Governor of the Commonwealth regarding any of his official duties. *Rice* v. *The Governor*, 577.

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2. Money which came into the hands of a Governor from his predecessor in office, who received it from the Federal Government under the terms of 30 U. S. Sts. at Large, 1356, entitled "An Act to reimburse the Governors of States and Territories for expenses incurred by them in aiding the United States to raise and organize and supply and equip the Volunteer Army of the United States in the existing war with Spain," and for the purpose of being paid to the officers and men referred to in the act, was *held* to have been received by the Governor in his official capacity. *Rice* v. *The Governor*, 577.

GRADE CROSSING ACTS.

1. The special act St. 1901, c. 205, entitled "An Act relative to the grade crossing of the Old Colony Railroad and the East Taunton Street Railway at Chace's Crossing in the city of Taunton," which allowed the East Taunton Street Railway Company to intervene and become a party to the proceedings upon the consolidated petitions then pending in regard to the abolition of certain grade crossings in Taunton, does not take the crossings referred to out of the operation of the general laws, and therefore the provisions of St. 1902, c. 440, and St. 1906, c. 463, Part I. § 29, are applicable to them. *Mayor & Aldermen of Taunton, petitioners*, 58.
2. The last sentence of St. 1906, c. 463, Part I. § 29, which is in substance a re-enactment of the corresponding provision in St. 1902, c. 440, § 1, provides as follows: "Upon all petitions hereafter filed, and upon all now pending on which no commission has been appointed, for the abolition, discontinuance or alteration of grade crossings, any street railway company having a location in the part of the public way where the crossing exists, shall be made a party and entitled to be heard as such." Upon a petition of the mayor and aldermen of Taunton for the abolition of certain grade crossings of the railroad of the Old Colony Railroad Company in that city, the Old Colony Street Railway Company was made a respondent. The street railway company appeared specially and filed a motion that the petition be dismissed as against it, on the ground that its predecessor in title, to whose rights it had succeeded, had tracks located on the parts of the public ways where these grade crossings were sought to be abolished before the enactment of St. 1902, c. 440, and that at the time of the enactment of that statute petitions were pending for the abolition of these crossings on which commissions had been appointed, and that the predecessor in title of the railway company was not made a party to those proceedings. It appeared that these previous petitions were dismissed by the court without prejudice, by agreement of all the parties thereto. *Held*, that the exception in the statute of pending petitions on which commissions had been appointed applied only to cases where the proceedings were pursued to a determination of the rights of the parties, and did not extend to petitions which were dismissed without prejudice by agreement of the parties, leaving their rights to be determined afterwards under the laws applicable to new proceedings, and therefore that the street railway

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company properly was made a party to such new proceedings and its motion to dismiss the petition as against it should be denied. *Mayor & Aldermen of Taunton, petitioners*, 58.

HIGHWAY.

See WAY, 9–12; NEGLIGENCE, 35; MUNICIPAL CORPORATIONS, 7–9.

HOMICIDE.

Jurors.

Certain informalities in selecting members of grand and traverse juries were held not to deprive Superior Court of jurisdiction of indictment for murder returned by such grand jury or to invalidate trial held before such traverse jury, see JURY AND JURORS, 1, 2, 4.

Nor did mere fact that one of such jurors removed from county after he was chosen as juror but before he served as such deprive court of jurisdiction, see JURY AND JURORS, 3.

As to challenging of jurors, see *post*, 17.

At hearing of motion by defendant for new trial of indictment for murder based on contention that one of jurors was insane during trial, burden of proving such contention by fair preponderance of evidence is on defendant, see *post*, 20.

Pleadings.

1. The objection that an indictment for murder is defective, in that it is uncertain whether the assault and the murder are charged to have been committed upon one and the same person, because the word "said" does not precede the second mention of the name of the person alleged to have been murdered, even if there is anything in the point, only can be taken upon a motion to quash the indictment. *Commonwealth* v. *Richmond*, 240.

2. While one indicted for murder is entitled, upon making a proper motion therefor, to any information in the possession of the Commonwealth which is necessary to enable him to understand the nature of the crime with which he is charged and to prepare his defense, there is no rule of law which requires the Commonwealth to disclose to the defendant, on a motion made before the defendant has pleaded, the evidence on which it relies for the proof of the allegations of the indictment, and the defendant has no right to ask for such disclosure. *Commonwealth* v. *Jordan*, 259.

3. Upon the return of an indictment for murder and before the defendant had pleaded to it, he made a motion that the district attorney be ordered to furnish him with a copy of the report of an autopsy of the deceased which had been made by a medical examiner, with a copy of an alleged confession by the defendant to certain police officers, with the names of all witnesses summoned before the grand jury when the indictment was found, with a transcript of the evidence upon which the grand jury found the indictment, and also that the district attorney be ordered to furnish to certain physicians designated by the defendant portions of the body of the deceased taken at the time of the autopsy by the medical examiner.

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Before the hearing of the motion, the district attorney furnished the defendant with a list of the witnesses who were before the grand jury. A judge of the Superior Court denied the motion as to all other things asked for by the defendant. *Held*, that the motion was in no just or proper sense a motion for a bill of particulars, and that its denial was within the discretion of the judge; and, *also*, even if it be assumed that the action of the judge was reviewable by this court, there was nothing to call for revision. *Commonwealth* v. *Jordan*, 259.

4. The statute prescribing, among other forms, a form for an indictment for murder, R. L. c. 218, is not an infringement of article 5 or of article 14 of the Amendments to the Constitution of the United States, or of article 12 of the Massachusetts Declaration of Rights, providing that "no subject shall be held to answer for any cause or offense, until the same is fully and plainly, substantially and formally, described to him," because the statutory form states all that is necessary to enable the accused fully to understand the offense charged and, if, in order to prepare his defense, the accused should require a more particular description of the manner in which and the means by which the alleged crime was committed, and for that reason the indictment may not be regarded as describing the crime "fully and plainly, substantially and formally," his constitutional rights are fully protected by the provisions of R. L. c. 218, § 39, which give him an absolute right to such particulars as it may be necessary for him to have in order to prepare his defense. *Ibid.*

Ordering Verdict.

5. At the trial of an indictment for murder a request of the defendant that a verdict of not guilty be ordered must be refused by the presiding judges if there is evidence, which, although wholly circumstantial, warrants a verdict of guilty under proper instructions in regard to the burden of proof. *Commonwealth* v. *Richmond*, 240.
6. At the trial of an indictment for murder it is not a sufficient reason for ordering a verdict of not guilty, that the jury might find that persons other than the defendant had an opportunity to commit the murder. *Ibid.*
7. At the trial of an indictment for murder it is not a sufficient reason for ordering a verdict of not guilty, that there are inconsistencies and contradictions in the testimony of witnesses, called by the Commonwealth, who at about the time of the murder were frequenting the house in which the murder was committed, because these matters affect only the weight of the evidence and are for the jury to pass upon. *Ibid.*

Evidence.

Presumptions and burden of proof.

8. If at the trial of a criminal case, there are inconsistencies in the testimony introduced by the Commonwealth upon a certain issue, this affects only the weight of the evidence and does not make it incompetent if it is material to the issue upon which it was admitted. *Commonwealth* v. *Richmond*, 240.

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9. At the trial of an indictment for murder, where the Commonwealth contended that there was evidence of killing by asphyxiation or strangulation and by blows on the head, and also that there was evidence that the victim's throat was cut during life, the Commonwealth is not obliged to show that the death of the victim was due to any one particular cause, but, if the jury are satisfied beyond a reasonable doubt that death was caused by a combination of injuries inflicted by the defendant, notwithstanding they are unable to determine the exact way in which the victim was killed, a verdict of guilty is warranted. *Commonwealth* v. *Jordan*, 259.

Verdict should not be ordered in certain cases, see *ante*, 5–7.

Competency.

10. At the trial of a criminal case, if the testimony of a witness introduced by the Commonwealth upon a certain issue tends to contradict the testimony of other witnesses called by the Commonwealth, although it was not introduced for that purpose, this does not make the evidence incompetent, if it was a statement by the witness of his observations by his senses and is material to the issue upon which it was admitted. *Commonwealth* v. *Richmond*, 240.

11. Where, at the trial of an indictment for murder, there is a question whether a certain cut on the neck of the deceased was made before or after death, the defendant contending that it was made after death and, for the proof of that contention, relying on evidence that it was of a nature described as "inverted," it is not proper in cross-examination of a medical expert called by the Commonwealth for counsel for the defendant, holding in his hand a book from which he apparently was framing the question, to ask the witness, "If Professor B. [who was not a witness in the case or in any way connected with it] . . . said that the inverted edge was evidence of a cut after death would that change the opinion which you now express that the . . . [cut] . . . may be *ante mortem?*", because an answer to the question would place before the jury in an indirect manner the opinion of Professor B. *Commonwealth* v. *Jordan*, 259.

Relevancy and materiality.

12. At the trial of an indictment for murder, certain evidence here was held to have been excluded properly as being indefinite and bearing no relation to any issue in the case, other evidence was held to have been excluded properly as not having been made material by necessary connecting evidence and also as being objectionable in form, and certain other evidence was held to have been admitted properly in the discretion of the presiding judges upon the redirect examination of a witness for the Commonwealth to explain a certain fact brought out upon his cross-examination. *Commonwealth* v. *Richmond*, 240.

13. At the trial of an indictment for murder where it is material to show the fact that the defendant was in her rooms on the evening of a certain day, evidence that the defendant the next morning made a request of a witness which showed that she must have heard a threat made in a loud voice outside her door the evening before, which tends to show that the

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defendant was inside the door at that time, may be admitted, although the testimony of the witness as to hearing the threat made outside the defendant's door otherwise would be inadmissible, if in admitting the testimony the presiding judges carefully limit its effect to the purpose for which it is material. *Commonwealth* v. *Richmond*, 240.

14. At the trial of an indictment for murder, where robbery is suggested by the Commonwealth as a motive for the crime, the Commonwealth may show that shortly before the finding of the body of the deceased the defendant was pressed for money and that on the day the body was found the defendant had a "roll of bills," that the deceased had money in his possession immediately before his death, and that no money whatever was found upon his body when discovered after his death. There here was evidence of all these things. *Ibid.*

Circumstantial.

Weight of circumstantial evidence is for jury, see *ante*, 5.

To contradict one's own witness.

15. The provisions of R. L. c. 175, § 24, permitting a party who produces a witness to contradict him by other evidence, apply to a witness produced by the Commonwealth in the trial of an indictment for murder. *Commonwealth* v. *Richmond*, 240.

Of motive.

16. At the trial of an indictment for murder, although the Commonwealth is not required to show any motive for the commission of the crime, evidence tending to show such a motive always is competent. *Commonwealth* v. *Richmond*, 240.

See also *ante*, 14.

Conduct of Trial.

17. Doubt, expressed by MORTON, J., as to whether it can be said that a defendant in an indictment for murder would not be harmed by being refused the right to challenge for cause a person improperly called to serve as a juror, where, upon such refusal, he exercises his right of peremptory challenge and in the impanelling of the jury does not exhaust the twenty-two peremptory challenges which he is allowed by R. L. c. 176, § 29. *Commonwealth* v. *Jordan*, 259.

18. At the trial of an indictment for murder, where there is evidence that shortly before the killing the defendant was pressed for money and after the killing had a roll of bills, that the deceased immediately before his death had money in his possession and that none was found upon his body, and where the Commonwealth has shown that the deceased was young, active and able-bodied and had been at work for many months in a State institution in a country town, without showing the amount of his compensation, if the district attorney says in his argument to the jury that the deceased had been working for $30 a month, when there is no evidence of it, but the argument is not interrupted and no ruling is requested upon the point and no exception is taken in regard to it, it will be assumed that the defendant was not harmed by the statement in the argument of the

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district attorney, and he cannot afterwards complain of it. *Commonwealth* v. *Richmond*, 240.

19. At the trial of an indictment for murder it appeared that the murdered person was killed in a lodging and boarding house kept by the defendant, and that a number of persons were in the house during the period of time within which the murder was committed. All of these persons except the defendant were called by the Commonwealth as witnesses and each of them was asked the question whether he or she killed the murdered man and answered "No." In his argument to the jury the district attorney said, "Is there anybody in this case whose presence or absence is unaccounted for, except the one party charged with the crime? . . . Every person but one has told you under oath that they did not kill [the deceased]. This is significant." The defendant's counsel objected, and the presiding judges said, "That will be taken care of in the charge." The district attorney continued, "You have been told that the defendant is not to be prejudiced because she did not take the stand. . . . That is the last thing in the world I shall ask of you — to infer anything from the fact that she did not take the stand. And what I have just said has no relation to that except the bare fact that everybody but she has testified under oath that they did not kill [the murdered person]." The defendant's counsel objected. The district attorney continued, "If she has in her power or control any evidence which will explain where she was [on the night the murder was committed], if she has any friends that could come here and tell you where she was, and what she was doing, if she has any means whatever of putting before you any evidence showing where she was, and she fails to do it, we are entitled to call your attention to that failure, and you are entitled to use it as you see fit. . . . If she has within her possession or control any evidence to show that she is innocent; if she has such evidence that an innocent person would produce, I am entitled to call your attention to her failure to do so; and you are entitled to consider it in this case." The judge in his charge to the jury instructed them that, although the defendant was permitted to testify in her own behalf, she was not obliged to do so, and that her failure to do so did not create any presumption against her and should not prejudice her in any way. He also gave accurate instructions as to the inferences which might be drawn from the defendant's failure to call other witnesses. At the close of the charge the defendant's counsel asked the presiding judge to instruct the jury that the district attorney had no right to make the argument above quoted. The judge refused to give such an instruction, and the jury returned a verdict of guilty. *Held*, that the argument of the district attorney that every person, so far as known, except the defendant, who had had an opportunity to do the killing had testified and, if such testimony was believed, did not commit the murder, leaving only the defendant unaccounted for, was a proper one, and that by the disclaimer of the district attorney of an intent to urge any inference from the defendant's failure to testify in her own behalf, coupled with the plain instruction in the charge of the judge, the constitutional rights of the defendant were amply protected. *Ibid.*

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New Trial.

20. At the hearing of a motion by the defendant for a new trial of an indictment for murder, based upon a contention that one of the jurors at the time of the trial of the case was insane, the rules relating to criminal practice and procedure do not apply, and the burden is upon the defendant of proving the insanity of the juror and of sustaining by a fair preponderance of evidence the contentions which are the basis of the motion; and, upon exceptions by the defendant to a finding by the judges, who heard the motion, that the juror was not insane, and to a denial of the motion, the question before this court is not as to the weight of the evidence, but only whether there was any evidence to support the finding. *Commonwealth* v. *Jordan*, 259.

HORSE.

See ANIMAL, 1, 2.

HOTEL.

Certain proposed legislation with regard to women under twenty-one years of age being admitted to or served with food or drink in hotel or restaurant conducted by Chinese, which, it was held, would be unconstitutional, see CONSTITUTIONAL LAW, 1, 8.

HUSBAND AND WIFE.

1. It is a presumption of fact that, in the absence of anything to the contrary, a husband is liable to pay a reasonable compensation to a physician who has attended his wife professionally for over a year, and, where it appears that the attendance was due to injuries caused by negligence of a third person which gave the wife a right of action against the negligent person, the husband also has a right of action against such person for the amount for which he is liable to the physician. *Driscoll* v. *Gaffey*, 102.

Action against marketman for injuries sustained by married woman from tack in leg of lamb alleged to have been purchased by her husband for food, where only question decided was whether there was evidence that husband acted as wife's agent in making purchase, and this court intimated that action also could have been maintained on ground of violation by defendant of duty to see that nothing was left embedded in leg of lamb which would cause injury to any person preparing it for food with reasonable care, see AGENCY, 1.

ICE AND SNOW.

See NEGLIGENCE, 7.

INHERITANCE TAX.

See TAX, 5–10.

INNKEEPER.

Certain proposed legislation with regard to women under twenty-one years of age being admitted to or served with food or drink in hotel or restaurant

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conducted by Chinese, which, it was held, would be unconstitutional, see CONSTITUTIONAL LAW, 1, 8.

INSOLVENT ESTATES OF DECEASED PERSONS.

See EXECUTOR AND ADMINISTRATOR, 1–4.

INSURANCE.

Life.

1. At the trial of an action upon a policy of insurance upon the life of a woman, it appeared that the insured signed for the defendant's medical examiner a statement containing a negative answer to the question, "Have you ever had gravel, bladder or kidney disease?", and that a little more than four months before she had been treated for Bright's disease of the kidneys in some form. There was evidence tending to show that she was not told that she had Bright's disease in any form, and also evidence that the form of Bright's disease that she then had was acute, which was curable, that after being at the hospital about two months she was discharged as "improved" and resumed her occupation, which was the care of a large boarding house where she did all the cooking, and that she continued at her occupation for over two years without interruption by sickness, when she was taken ill and died of "nephritis complicated with diabetes." By the terms of the policy, if the answer to the medical examiner's question was a misrepresentation and either was made with actual intent to deceive, or was as to a matter which increased the risk of loss, there could be no recovery upon the policy. The presiding judge ordered a verdict for the defendant on the ground that the insured had made a misrepresentation which as a matter of law increased the risk of loss. The plaintiff alleged exceptions. *Held*, that the questions, whether the disease with which the insured was afflicted before she made the statement in question was the acute or chronic form of Bright's disease, and whether, if acute, it increased the risk of loss, were for the jury, and that the exceptions must be sustained. *Kelly* v. *Mutual Life Ins. Co.* 398.

Right of beneficiary of life insurance policy to maintain action thereon in his own name, see PRACTICE, CIVIL, 1.

Right to surrender value of life insurance policy which passed to assignee for benefit of creditors of insured, see ASSIGNMENT, 3–6.

Question of medical expert witness at trial of action on life insurance policy, which was held improper because it asked expert's opinion on whether person was "insurable," see EVIDENCE, 8.

Trial of action upon policy of life insurance at which insurance company contended that policy was procured by fraud and question arose as to whether law of this Commonwealth or of another State governed, and law of such other State was not in evidence; and in which erroneous rulings of presiding judge on such question were held not to afford to company ground for exceptions because they were too favorable to it, see PRACTICE, CIVIL, 28.

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Fire.

Sale of premises by insured without assent of insurer.

2. If the person named as the insured in a Massachusetts standard policy of insurance against loss by fire of a dwelling house owned by him, which contains a provision that the policy shall be void if, without the assent of the insurance company, the property "shall be sold, or this policy assigned," sells the property without the knowledge or assent of the insurance company which issued the policy or of another company which has reinsured the risk, neither the person named in the policy as the insured nor the person to whom he has sold his interest in the land, has any further interest in the policy, which as to them is void. *Flint* v. *Westchester Fire Ins. Co.* 337.

Assignment to insurer of mortgagee's interest in policy.

8. The owner of certain mortgaged premises upon which was a dwelling house insured the dwelling house under a Massachusetts standard policy of insurance, "loss if any [being made] payable to" the mortgagee, "as its interest may appear," and thereafter, without the assent of the company, sold and conveyed the premises to another. Subsequently the risk of the insurance company was reinsured by a second company so that the reinsuring company stood in the place of the original insurer. The dwelling house having burned, the reinsuring company, by reason of the clause in the policy that it should become void in case the property was sold without the assent of the company, refused to pay anything to the owner of the property or to the insured, and, acting under the provisions of the policy which protected the mortgagee against the policy's being made void by act or default of any one else, and provided that, whenever the company should "be liable to a mortgagee for any sum for loss under this policy, for which no liability exists as to the mortgagor, or owner, and this company shall elect by itself, or with others, to pay the mortgagee the full amount secured by such mortgage, then the mortgagee shall assign and transfer to the companies interested, upon such payment, the said mortgage, together with the note and debt thereby secured," paid to the mortgagee the amount due on the mortgage, which was less than the amount of the policy, and caused an assignment of the mortgage to be executed by the mortgagee to a trustee for it. *Held*, that the assignment to the trustee was in effect an assignment to the company, and was within the rights of the company under the provision of the policy above quoted, and that neither the owner of the premises nor the insured had any rights in equity as to the mortgage or mortgage note or as to the amount of the policy beyond the amount due on the mortgage note. *Flint* v. *Westchester Fire Ins. Co.* 337.

INTENT.

1. Collection by RUGG, J., of cases dealing with criminal offenses created by statute in which innocence of intent is no defense. *Commonwealth* v. *Mixer*, 141.

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Evidence which was held to be relevant and material, at trial of indictment for larceny, to prove intent to commit crime charged, see LARCENY, 6.

INTEREST.

Proper computation of interest upon amount found due by master in suit in equity, see EQUITY JURISDICTION, 18.

Where, in action against surety on bond given to secure faithful performance of contract, penalty of bond is less than damages which in equity and good conscience plaintiff is entitled to recover, interest should be allowed on amount of such penalty, see BOND, 1.

INTERROGATORIES.

See PRACTICE, CIVIL, 25.

INTERSTATE COMMERCE.

See CONSTITUTIONAL LAW, 4; TELEGRAPH, 2; TAX, 2-4.

INTOXICATING LIQUORS.

Transportation.

1. To a complaint under St. 1906, c. 421, charging the defendant with transporting for hire intoxicating liquor into a city where licenses of the first five classes for the sale of intoxicating liquors were not granted, without first having been granted a permit so to do, it is no defense that the defendant did not know and had no reason to surmise that there was intoxicating liquor in the package which he is shown to have transported. *Commonwealth* v. *Mixer*, 141.

2. *It seems*, that a common carrier of goods, in order to protect himself against committing the crime created by St. 1906, c. 421, has a right under the proper circumstances to inspect packages offered for transportation for the purpose of ascertaining whether they contain intoxicating liquors and may refuse to take any package which he is not allowed to inspect in a reasonable manner for this purpose. *Ibid.*

Sale.

3. At the trial of a complaint against a retail druggist, licensed as a pharmacist, for keeping and maintaining a tenement used by him for the illegal sale and the illegal keeping of intoxicating liquors, there was evidence that on a certain day a quantity of liquors was seized in the cellar of the shop of the defendant, and that there were found in the cellar six or seven bottles of ale with straw coverings upon them and near them on the floor seventy-five or more similar straw coverings without bottles in them. There also was evidence of a sale by the defendant on the same day of half a pint of gin without a physician's prescription. *Held*, that the evidence warranted a finding that one of the purposes for which the defendant kept his shop was to sell intoxicating liquors there illegally, and required the submission of the case to the jury. *Commonwealth* v. *Maddocks*, 152.

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Charge of judge, presiding at trial of complaint for illegal sale of intoxicating liquor, which was held improper as to certain comment upon argument of defendant's counsel with regard to jurors' responsibility, see PRACTICE, CRIMINAL, 6.

Instruction as to burden of proof, asked for by defendant at trial of complaint for illegal sale of intoxicating liquor, which should have been given and was refused erroneously, see PRACTICE, CRIMINAL, 5.

Rulings of judge, presiding at trial of complaint for illegal sale of intoxicating liquors, in admission of evidence as to reputation of defendant offered by Commonwealth to rebut evidence introduced by defendant, which were held to be correct, see EVIDENCE, 16.

Exception of defendant, at trial of complaint charging in single count unlawful sale of intoxicating liquor to minor, to refusal of judge to compel Commonwealth to elect as between two such offenses which its evidence tended to prove, was sustained under circumstances, see PRACTICE, CRIMINAL, 1–3.

INVITED PERSON.

See NEGLIGENCE, 5.

JOINT TORTFEASORS.

Case in which it was held that there was evidence which would have warranted finding that five defendants conspired together in commission of fraud upon plaintiff, see CONSPIRACY, 1.

See also NEGLIGENCE, 47.

JUDGMENT.

Finality of decree of Probate Court until it is vacated or changed by that court, see PROBATE COURT, 2.

Judgment in action at law against "the goods and estate" of debtor in hands of his assignee for benefit of creditors is not judgment known to law and does not show election by judgment creditor to look to assignee personally for satisfaction of his claim, see EQUITY JURISDICTION, 5.

JURY AND JURORS.

1. The Superior Court is not deprived of jurisdiction of an indictment for a murder returned by a grand jury chosen from lists prepared after St. 1907, c. 348, amending R. L. c. 176, with regard to the methods of choosing jurors, went into effect, by the mere fact that the list of persons qualified to act as jurors, which was prepared by the selectmen of one of the towns in the county, was submitted to and accepted by the voters of the town at a town meeting, which had been necessary under the provisions of R. L. c. 176, § 5, but was rendered unnecessary by the amendment contained in St. 1907, c. 348, § 5. *Commonwealth* v. *Jordan*, 259.

2. The provisions of R. L. c. 176, § 5, as amended by St. 1907, c. 348, § 5, requiring delivery to the clerk of the city or town to which the list of per-

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sons eligible for jury duty, prepared in accordance with R. L. c. 176, § 4, as amended by St. 1907, c. 348, § 1, relates, and to the clerks and assistant clerks of the Supreme Judicial and Superior Courts in the county in which such city or town is situated, are directory and not mandatory, and such requirements are incidental rather than fundamental; and therefore the Superior Court is not deprived of jurisdiction of an indictment for murder by the mere fact that some members of the grand jury which returned the indictment were chosen in towns where such requirements were not complied with and from names on lists, copies of which were not furnished to the various clerks of towns and of courts as specified in the statute, if the jurors themselves were personally qualified to serve. *Commonwealth* v. *Jordan*, 259.

3. The Superior Court is not deprived of jurisdiction of an indictment for murder by the mere fact that one member of the grand jury which returned the indictment, personally fitted to serve thereon, after he was chosen as a juror and before the return of the indictment, had removed from and ceased to be an inhabitant of the town from which he was drawn and had become an inhabitant of another town in the same county, because such removal in itself did not disqualify him from acting as a member of the grand jury. *Ibid.*

4. The mere fact that a printed copy of the list of persons qualified to act as jurors, prepared by the selectmen of a town in accordance with R. L. c. 176, § 4, as amended by St. 1907, c. 348, § 1, was not furnished to the clerk of the town and to the clerks and assistant clerks of the Superior and Supreme Judicial Courts in the county in which the town was situated, as required by R. L. c. 176, § 5, as amended by St. 1907, c. 348, § 5, does not give the defendant in an indictment for murder a right to challenge for cause a person duly drawn from such list and personally qualified to serve as a traverse juror in the trial of the indictment. *Ibid.*

Presumption that jury follow correct instructions of judge at trial of civil action or of criminal proceeding, see PRACTICE, CIVIL, 21; PRACTICE, CRIMINAL, 9.

Opinion of justices of this court upon constitutionality of certain proposed legislation as to new trials after verdicts have been set aside, see CONSTITUTIONAL LAW, 10, 11.

At hearing of motion for new trial of indictment for murder where defendant contends that one of traverse jurors was insane at time of trial, burden is on defendant to prove his contention by fair preponderance of evidence, see HOMICIDE, 20.

Whether under certain circumstances defendant under indictment for murder would be harmed by being refused right to challenge for cause person improperly summoned to act as juror, if he did not exhaust peremptory challenges to which he was entitled, see HOMICIDE, 17.

LABOR UNION.

Whether Strike is Lawful.

1. Whether the purpose for which a labor strike is instituted is or is not a legal justification of the strike is a question of law. *De Minico* v. *Craig*, 593.

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2. In order that a labor strike should be a legal one it is necessary that the strikers should have acted in good faith in striking for a purpose which the court holds to have been a justification of the strike. *De Minico* v. *Craig*, 593.
3. A labor strike to get rid of a foreman because some of the workmen under him have a dislike for him is not a strike for a legal purpose. *Ibid.*
4. A labor strike is not a legal one merely because the strikers instituted it in good faith for a purpose which they thought to be a legal justification of the strike. *Ibid.*
5. It is not a justification of a labor strike that a foreman is "distasteful" to some of the employees under him. *Ibid.*
6. A labor strike properly cannot be said to be for the purpose of bettering the condition of the workmen concerned in it merely because its purpose is to escape from something which the workmen dislike. *Ibid.*
7. It here was said by way of illustration, that, if a foreman was in the habit of using epithets so insulting to the workmen under his direction that they could not maintain their self respect while working under him, a strike to get rid of him would be a lawful one. *Ibid.*

Illegal Acts after Strike was ended.

8. The members of a teamsters' labor union, more than four months after a justifiable strike against an employer of teamsters in a city has ended, cannot lawfully drive about the streets of the city a wagon bearing initials indicating the name of the union and placards stating "The union teamsters are on strike for hours and wages" at such employer's place of business. *M. Steinert & Sons Co.* v. *Tagen*, 394.
9. An employer of labor may maintain a suit in equity to enjoin officers and members of a labor union from driving about the streets of a city containing the employer's place of business, more than four months after a strike which had been declared against the employer had ended, wagons bearing initials indicating the name of the union and placards stating, "The union teamsters are on strike for hours and wages" at such employer's place of business, although he is unable to prove the existence of any loss occasioned by such acts, the acts sought to be enjoined being unjustifiable and manifestly intended merely to injure the plaintiff. *Ibid.*
10. In a suit in equity by an employer of labor against officers and members of a labor union, where a material question was whether a certain strike, begun on a May 2, had ended before the following October 14, the judge who heard the case reported to this court his finding of the following facts: The strike was declared May 2. Eleven men left the plaintiff's employ and a few days thereafter the plaintiff secured men to take their places and thereafter continued with a force which was adequate and as large as he desired. Of the eleven who left the plaintiff's employ, eight at once secured new employment in the same city and three left the Commonwealth. A short time after the strike began an international organization, with which the striking union was affiliated and which at first had aided it, ceased to do so. *Held*, that the strike was over on October 14. *Ibid.*

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LACHES.

See EQUITY JURISDICTION, 1, 8.

LAND COURT.

Decree.

1. A judge of the Land Court, before whom was heard a petition for the registration of the title to certain flats, at the hearing of which the petitioner contended that the language of a certain grant of a right of passage over the flats gave only a right of passage on foot at low tide, and that a passageway by water could not be the subject of private grant, ruled that the passageway "was intended to be a way by water," and ordered a decree that the title be registered "subject to a right . . . as recited in" the deed. The petitioner excepted "because the decree is indefinite as to the limits of and uses of the said right of way." This court, having determined that the right of passage over the flats granted by the deed was at any and all times by any reasonable method of travel and whether the flats were bare or were covered by water, *held*, that the order for a decree was not intended to state in detail the full terms of the final decree as it should thereafter be drawn, nor was the ruling that there was a way by water to be regarded as a statement of the whole nature of the easement, but merely as a ruling upon the feature of it which was in dispute, leaving the details to the future action of the court; and that, thus interpreted, the order was valid. *Old Colony Street Railway* v. *Phillips*, 174.

Appeal.

On exceptions to the court from rulings of judge of Superior Court refusing to submit to jury several issues framed on appeal from Land Court and ordering answers adverse to excepting party, new trial was ordered only on some of the issues, see PRACTICE, CIVIL, 6.

Whether at trial of writ of entry on appeal from Land Court there was evidence that execution of certain deed of corporation by its treasurer was authorized by it, and effect as evidence of report of judge of Land Court, finding that it was not so authorized, and of deed itself, see CORPORATION, 1, 2; DEED, 1.

LANDLORD AND TENANT.

Construction of Lease.

1. A covenant of a lessee, to put the leased premises "in as good repair as they were at the beginning of said term," does not require him to remove trade fixtures of permanent construction which with the consent of the lessor he had added to the premises during the term of the lease, and which after the termination of the lease it was necessary for the lessor to have removed in order to make the premises rentable. *Perry* v. *J. L. Mott Iron Works Co.* 501.

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2. A lease in writing by the owner of certain premises to a corporation contained the following provision: That the lessee would "not injure, overload or deface the premises in any way, or suffer or permit the premises or any part thereof, during or at the determination of these presents, to be injured, overloaded or defaced in appearance, whether by removal of any fixture or otherwise; and . . . not make any alterations or additions during the term . . . except such as are hereinafter permitted . . . and peacefully yield up to the lessor the premises, and all erections and additions made to or upon the same, clean and in good repair in all respects. . . . And it is agreed that the lessee may make such alterations and additions within said leased premises as may be necessary for his business, and may remove at the termination of this lease such tiling and special fittings as have been put in at his own expense, provided he puts the premises in as good repair as they were in at the beginning of said term." In an action by the lessor against the lessee to recover under the lease the expense of removing certain trade fixtures of permanent construction installed by the lessee, the lessor offered in evidence a preliminary agreement to lease signed by the parties, which contained the following: "The lessee is to have the right to make such alterations and additions within said leased premises as may be necessary for his business, and to remove at the end of said term such tiling and special fittings as he puts in at his own expense, hereby agreeing to put the premises in as good repair as they are at the beginning of said term, reasonable wear and tear excepted." The preliminary agreement was excluded. *Held*, that the lease was neither obscure nor ambiguous, and that the preliminary agreement rightly was excluded. *Perry* v. *J. L. Mott Iron Works Co.* 501.

3. The owner of a store leased it to a corporation engaged in the business of selling bathroom and sanitary fixtures and plumbers' supplies, the lease containing the following provisions: That the lessee would "not injure, overload or deface the premises in any way, or suffer or permit the premises or any part thereof, during or at the determination of these presents, to be injured, overloaded or defaced in appearance, whether by removal of any fixture or otherwise; and . . . not make any alterations or additions during the term . . . except such as are hereinafter permitted . . . and peacefully yield up to the lessor the premises, and all erections and additions made to or upon the same, clean and in good repair in all respects. . . . And it is agreed that the lessee may make such alterations and additions within said leased premises as may be necessary for his business, and may remove at the termination of this lease such tiling and special fittings as have been put in at his own expense, provided he puts the premises in as good repair as they were in at the beginning of said term." The lessee, with the knowledge and consent of the lessor, for its purposes built upon the premises six bathrooms with plaster walls covered with tiling and installed appropriate fixtures and tiled floors and a balcony, all of permanent construction, and at the termination of the tenancy, the lessee not removing such structures, the lessor, because their removal was necessary in order that the premises might be let to another tenant, removed them and by an action of contract sought to re-

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cover from the lessee the expense thereby entailed. *Held*, that the words in the lease, "provided he puts the premises in as good repair as they were in at the beginning of said term," did not require the lessee to remove the structures in question, and therefore, since the structures were installed with the lessor's consent, he could not recover from the lessee the expense of removing them. *Perry* v. *J. L. Mott Iron Works Co.* 501.

Tenant's Liability for increased Rent due to Betterment Tax.

4. Under St. 1871, c. 382, § 9, which provided that, "when an assessment is made upon an estate, the whole or any portion of which is leased, the owner . . . shall pay the assessment, and may thereafter collect of the lessee an additional rent for the portion of the estate so leased," proportionately reckoned, which was codified into R. L. c. 50, § 8, with some verbal changes which did not affect its construction, no obligation on the part of the tenant comes into being until payment of the betterment is made by the owner, and the liability then becomes merely a future liability to be reckoned from that time, not a liability also for past time; and therefore if a betterment tax is assessed upon an estate under lease, and, by reason of a petition by the owner for an abatement thereof, which is finally compromised and settled, the payment of the tax is delayed until after the termination of the tenancy, the tenant is under no liability under the statute to pay to the owner any increase of rental. *Snow* v. *Rice*, 331.

Landlord's Liability to Tenant for Unlawful Expulsion.

Action by tenant against landlord for alleged unlawful expulsion from premises, see AGENCY, 8; DAMAGES, 2.

LARCENY.

What constitutes.

1. Under R. L. c. 208, § 26, an indictment for larceny of the property of a certain person may be sustained by showing that the defendant obtained money from the alleged victim in payment for a supposed half interest in another person's pretended business by means of false representations as to the extent and profits of the business, especially where this is shown to have been done as part of a general scheme to defraud. *Commonwealth* v. *Stuart*, 563.
2. The fraud of obtaining property by buying it intending not to pay for it is not under the statutes of this Commonwealth the crime of obtaining property by a false pretense which is included in larceny. *Commonwealth* v. *Althause*, 32.
3. The crime of larceny by obtaining property by false pretenses as distinguished from larceny at common law consists in obtaining by a false pretense the title to property and not its mere possession, so that to make out a case of obtaining property by a false pretense it must be shown either that the title was so obtained or that a contract was procured by a false pre-

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tense under which the owner of the property passed the title to another. *Commonwealth* v. *Althause*, 32.

4. If the holder of a note secured by a pledge of negotiable securities, which an agreement contained in the note gave him the right to pledge but not the right to sell before default, obtained the pledge and the agreement by means of a false pretense, and afterwards contrary to the terms of the agreement wrongfully sold the pledged property before default, although this is larceny at common law and also is larceny as defined by R. L. c. 208, § 26, it is not larceny through obtaining property by a false pretense. *Ibid.*

Evidence.

Burden of proof.

5. At the trial of an indictment for larceny, where a bill of particulars filed by the Commonwealth at the request of the defendant sets forth the facts relied upon by the Commonwealth without any color being added to them by way of a conclusion of law, the Commonwealth is at liberty to make out larceny in any way in which the facts stated show that a larceny was committed, whether it was a larceny at common law, or by embezzlement, or by obtaining property by false pretenses, or under the definition contained in R. L. c. 208, § 26. *Commonwealth* v. *Althause*, 32.

Relevancy and materiality.

6. At the trial of an indictment for larceny, if there is evidence that the defendant, who had taken certain negotiable securities as a pledge to secure a note which contained an agreement giving the pledgee the right to pledge but not the right to sell before default the securities held as collateral, wrongfully sold the pledged property before default the day after he received it, and if the defendant contends that in selling the pledged securities he acted honestly believing that he had a right to sell them by the terms of the agreement contained in the note, the Commonwealth may show that at the time the pledge was made the defendant represented to the pledgor that the pledged securities would be pledged by the defendant to a certain bank from which they could be procured by the substitution of other collateral on one or two days' notice of intended payment of the note, this representation by the defendant of his intention as to dealing with the securities, which he sold the next day, being material to show criminal intent on his part. *Commonwealth* v. *Althause*, 32.

LEGACY.

See DEVISE AND LEGACY.

MALICIOUS INTERFERENCE.

Facts justifying conclusion that certain strike had ceased at certain time; and ruling that driving about streets of wagon bearing placard that such strike still was in progress was unjustifiable and intended to injure employer at whose place of business strike had been in progress, see LABOR UNION, 8–10.

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MANDAMUS.

Supreme Judicial Court has no power to issue writ of mandamus addressed to Governor regarding any of his official duties, see GOVERNOR, 1.

MARRIAGE AND DIVORCE.

1. R. L. c. 152, § 18, is as follows: "Decrees of divorce shall in the first instance be decrees *nisi*, and shall become absolute after the expiration of six months from the entry thereof, unless the court before the expiration of said period, for sufficient cause, upon application of any party interested, otherwise orders." Divorce Rule 6 is as follows: "At any time before the expiration of six months from the granting of a decree of divorce *nisi*, the libellee, or any other party interested, may file in the office of the clerk for the county in which the libel is pending, a statement of objections to an absolute decree, which shall set forth specifically the facts on which it is founded, and be verified by affidavit. Such decree shall not become absolute until such objections have been disposed of by the court." *Held*, that this rule of court is not in conflict with the statute, but on the contrary is an order made under the statute by all the judges of the Superior Court in adopting the rule, and that there is nothing in the statute which requires a special order in each case rather than a general order applicable to all cases of a certain class. Therefore, where a decree *nisi* has been made and objections to an absolute decree are filed under the rule before the expiration of six months from the granting of the decree *nisi*, such decree does not become absolute under the statute at the expiration of the six months. *Brown* v. *Brown*, 254.

MARRIED WOMEN.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

See AGENCY.

MILL ACTS.

Where, in petition under mill act, respondent contended that he had right by prescription to do act complained of, he may show, on question whether acts of adverse user were committed by his predecessor in title, that such predecessor had motive for doing so, see EVIDENCE, 20.

MILLS AND MILL OWNERS.

Where, in petition under mill act, respondent contended that he had right by prescription to do act complained of, he may show, on question whether acts of adverse user were committed by his predecessor in title, that such predecessor had motive for doing so, see EVIDENCE, 20.

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MISTAKE.

Bill in equity by beneficiary under trust against trustees to set aside release given by plaintiff to defendants and to rescind transaction in which it was given on ground that parties were acting in transaction under mistake and that it resulted in unjust enrichment of trust, see EQUITY JURISDICTION, 10–13.

MORTGAGE.

Of Real Estate.

Certain acts of mortgagee of real estate which were held not to indicate that agent was authorized to receive payment of principal of mortgage note nor to estop mortgagee from denying that agent had such authority, see AGENCY, 4, 5.

Assignment to trustee for insurance company, by mortgagee of certain real estate, of his interest under policy of fire insurance upon payment to him of mortgage debt, which was held to be in effect assignment to company under provisions of Massachusetts standard policy, see INSURANCE, 8.

MUNICIPAL CORPORATIONS.

Officers and Agents.

Council.

1. If the municipal council of a city in conducting the affairs of the public act with ill-will toward a certain individual instead of acting only with a due regard to the interests of the public, this does not give the subject of their ill-will a cause of action in tort against the members of the council, who are answerable only to the public in conducting public affairs. *Hodgdon* v. *Moulton*, 445.

Assessors.

2. A town has no authority to expend money to pay its assessors for work done, after they have completed the assessment in a certain year, in preparing a new valuation of the taxable property of the town with a view to its publication and its subsequent use by the assessors in making the assessment in the following year. *Gile* v. *Perkins*, 172.
3. Whether in a year in which the assessors of a town are obliged to do an unusual amount of work in making the valuations required and contemplated by the statutes, it would be reasonable for the town under R. L. c. 12, § 99, to add to the compensation which the statute gives them for their services, here was referred to as a question which did not arise in the present case. *Ibid.*

Tree wardens, foresters and park commissioners.

4. Statement by RUGG, J., of the respective duties imposed by our statutes on tree wardens, foresters and park commissioners in regard to shade trees, bushes and trees other than shade trees in towns and cities. *Wright* v. *Chelsea*, 460.

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Superintendent of public buildings.

5. In a city which has accepted R. L. c. 104, §§ 1, 4, providing for the regulation by ordinances and by-laws of the inspection, materials, construction, alteration and use of buildings, and that "the superintendent of public buildings or such other officer as the mayor and aldermen . . . may designate shall be inspector of buildings," a person who does not hold any other office in the city cannot be appointed to the office of inspector of buildings. *Scanlon* v. *Carey*, 285.

Committee on water supply.

6. Where a committee on water supply of a town consisting of seven members, of whom one is the chairman, have authority to make a contract for the construction of a tunnel to hold a conduit for the waterworks of the town, and make such a contract, which the contractor afterwards abandons on finding the difficulties so great that it can be performed only at an excessive loss to him, no waiver of or change in the terms of the contract can be made in behalf of the town by the chairman of the committee except so far as authority to do this has been given to him by his associates, who together with the chairman have power to act for the town only as a collective body. *Rowe* v. *Peabody*, 226.

By-Laws and Ordinances.

7. Chapter 17 of the ordinances of the city of Chicopee of 1891 provided among other things that the mayor and aldermen should have exclusive power to license the erection and maintenance of telegraph and other lines of electric wires within the city, and that any license granted pursuant to the ordinance should be subject to the right of the city, free of charge, to place its fire alarm, telegraph or other electric wires upon the poles so licensed to be maintained. An inspector of wires of the city also was provided for in the ordinance. In 1891, a telegraph company, which applied for permission to erect poles and maintain wires on certain public ways in the city, was allowed such permission only subject to the requirements of the ordinance and to an agreement to save the city harmless from loss, cost or damage resulting from the erection or maintenance of the poles or wires, and accordingly it erected its poles and wires and the city placed thereon the wires of its fire alarm system, and in 1906 the wires for its municipal electric light system, over some of which was carried an alternating current of high tension. In a suit in equity by the telegraph company to enjoin the city from maintaining electric wires upon the plaintiff's poles, a master, to whom the case was referred, found that the additional expense to the plaintiff caused by the presence of the defendant's wires was very small, as also was the cost to the defendant of inspection, that while the presence of the city's high tension wires upon the plaintiff's poles made it more dangerous for persons to go upon the poles, no accidents had happened because of that fact, and that, while high tension alternating currents close to the plaintiff's wires would cause induction, the defendant's wires had had no appreciable effect upon the

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plaintiff's business. *Held*, that both in its purposes and in its application the ordinance of the city was reasonable and proper and was within the authority given to cities by R. L. c. 25, § 54, c. 26, §§ 2, 6, to regulate the erection and maintenance of wires for the transmission of electricity within their boundaries. *Postal Telegraph Cable Co.* v. *Chicopee*, 341.

8. Chapter 17 of the ordinances of the city of Chicopee of 1891 provided among other things that the mayor and aldermen should have exclusive power to license the erection and maintenance of telegraph and other lines of electric wires within the city, and that any license granted pursuant to the ordinance should be subject to the right of the city, free of charge, to place its fire alarm, telegraph or other electric wires upon the poles so licensed to be maintained. An inspector of wires of the city also was provided for in the ordinance. A telegraph company, which had received a permit from the city to place its poles and wires in certain public ways in the city, which were post roads, which permission was made provisional upon observance of the requirements of the ordinance and upon an agreement by the company to save the city harmless from loss, cost or damage resulting from the erection or maintenance of the poles and wires, allowed the city to place upon the poles the wires of its fire alarm system and of its municipal lighting plant. Very little expense or inconvenience resulted to the company therefrom. *Held*, that all that was done by the city under the ordinance had but a slight and incidental effect upon interstate commerce, through the imposition of a local regulation of the use of the streets for the purpose, primarily and principally, of preventing the erection of unnecessary and objectionable poles to the obstruction of travel, and, secondarily, to provide compensation to the city for the expense of inspecting the line of telegraph for the protection of the public; and that therefore neither the ordinance nor the acts of the city were in violation of the implied prohibition of the Constitution of the United States against interference with interstate commerce. *Ibid.*

Principle which governed foregoing decision, see CONSTITUTIONAL LAW, 9.

9. An ordinance of a city entitled "Electric Wires," which regulated the erection and maintenance of poles and electric wires in the public highways, contained a provision that the city, upon granting permission to any person or corporation to erect poles and maintain wires, should have the right to license the location of lines by any other person or corporation upon such poles upon payment being made to the corporation owning the poles of a reasonable compensation, but that the city should be permitted to place electric wires for its uses upon the poles free of charge. A company received and accepted a permit from the city in 1891, which was made subject to the ordinance called "Electric Wires," but which referred to it by the wrong number. Wires of the city, used in its electric fire alarm and its municipal lighting systems, without objection by the companies were maintained on the poles of the company and of several successors to its rights until 1908 when the then operating company sought by a bill in equity to enjoin the city from maintaining any wires upon its poles. It appeared from a report of a master to whom the suit was referred, that to compel the city to take its wires from the plaintiff's poles

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and to erect new poles for them would involve a large expenditure of money and would result in overcrowding the streets with poles. This court, without determining whether the ordinance, in making the provision as to permitting the city to use the poles free of charge while other companies licensed by the city might use them upon making compensation, went too far, *intimated* that, even if because of such provision in the ordinance the maintenance of the city's wires upon the plaintiff's poles was a technical invasion of the plaintiff's right, that right, under the circumstances of the long apparent acquiescence by the plaintiff and its predecessors in the use of the poles by the city and of the expense and overcrowding of the streets with poles which would be involved in causing the removal of the city's wires, could not be enforced by injunction in equity, but only by seeking damages in an action at law. *Postal Telegraph Cable Co.* v. *Chicopee*, 341.

Petition for damages due to construction of sidewalk in front of petitioner's premises, which was held maintainable although order establishing grade for sidewalks had been made twelve years before, it properly being held by judge hearing case without jury that former layout had been abandoned, see WAY, 9.

Liability to Purchaser of Defective Tax Title.

10. A purchaser at a tax sale made by the collector of taxes of a town cannot recover from the town the amount paid by him for his tax deed containing the warranty required by R. L. c. 13, § 43, upon showing that the title was defective by reason of an insufficient notice of the sale by the collector, unless such purchaser within two years after the date of the deed complied with the requirement of R. L. c. 13, § 44, by offering by a writing given to the collector to surrender and discharge his deed or to assign and transfer to the town all his right, title and interest in the premises. *Williams* v. *Dedham*, 412.

11. Whether the liability to the purchaser at a tax sale, which is imposed on a town or city by R. L. c. 13, § 44, in case it appears that, by reason of an error, omission or informality in the assessment or the sale, the purchaser has no claim upon the property sold, properly may be considered a liability upon the warranty of the collector of taxes that the sale has in all particulars been conducted according to law, which is required by R. L. c. 13, § 43, to be inserted in all the deeds, here was not passed upon, because, although the action was brought against a town on the warranty, no recovery was permitted on account of the plaintiff's failure to make the offer required by R. L. c. 13, § 44. *Ibid.*

MUNICIPAL COURTS.

See PRACTICE, CIVIL, 10.

MURDER.

See HOMICIDE.

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NATURALIZATION.

Invalidity of amendment of R. L. c. 165, § 81, by St. 1908, c. 253, making certain requirements of clerks of courts in the several counties with regard to naturalization fees received by them under 34 U. S. Sts. at Large, c. 3592, and possible way of accomplishing same result by proper legislation, see CONSTITUTIONAL LAW, 5–7.

NEGLIGENCE.

Due Care of Plaintiff.

1. Collection by SHELDON, J., of authorities in other jurisdictions, supporting the proposition, that it may not be negligence for one, who is not acting rashly or recklessly, to expose himself voluntarily to great danger and even to the risk of life and limb, in order to rescue another from a like peril, and that such a voluntary exposure is not to be regarded as rash or reckless if there appears to be a fair chance of success, although the person attempting the rescue knows that it involves great hazard to himself without a certainty of accomplishing the rescue. *Dixon* v. *New York, New Haven, & Hartford Railroad*, 126.
2. In an action against a railroad corporation by the driver of a meat wagon, who had been sent by his employer to unload beef from a car standing on a track in a freight yard of the defendant, if there is evidence that the plaintiff, seeing the driver of another team struggling to restrain a plunging horse upon or close to a track of the defendant on which a train was approaching, went to the assistance of such other driver for the purpose of rescuing him from impending danger and in doing so went upon the track and was run over by the train, and was injured, the question whether the plaintiff was in the exercise of due care is for the jury. *Ibid.*

In riding on elevator, see *post*, 39.

Of woman in crowd attempting to board street railway car in station of elevated railway company, see *post*, 23.

Whether one, who was injured because of hole in earth sidewalk, is precluded from recovery from municipality under R. L. c. 51, § 18, because he had passed over hole before on same day as accident, see WAY, 11.

Due Care of Plaintiff's Intestate.

Of teamster in use of weak strap, see *post*, 18, 19.

Due Care of Person in Charge of Child.

See *post*, 4.

Assumption of Risk.

By employee, see *post*, 6.

By woman who voluntarily became passenger upon crowded street car, see *post*, 25.

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Imputed.

3. Where one, while being driven in an automobile as a guest of the person driving it, received fatal injuries in a collision on a public way caused directly by the negligence of a third person, to which negligence on the part of the driver contributed, the administrator of his estate, if at the time of the collision the intestate was in the exercise of due care, may recover damages from the negligent third person for the conscious suffering of the intestate in spite of the negligence of the driver whose guest he was. Following Shultz *v.* Old Colony Street Railway, 193 Mass. 309. *Littlefield* v. *Gilman*, 539.

4. At the trial of actions against a street railway company for the conscious suffering and death of a girl three years and four months of age, caused by her being run over by a street car, there was evidence tending to show that, on the day in question the child had been with her mother until a little before 11 A. M., while the mother was doing her housework, that then she was allowed by her mother to go out and play in a yard in front of her home with a boy acquaintance four years and three months of age, they being constantly within the mother's view from the window, that the yard was enclosed on three sides but was open on the side of the street, which was an ordinary village street not thickly settled, along which ran a single street railway track on the other side of the street from the child's home where cars passed half hourly, that the mother repeatedly had instructed the child not to leave the yard, and had explained to her the dangers of doing so, and that the child never before had disobeyed, that at five minutes before eleven the mother looked out of the window into the yard and the children then were playing there, that thereafter the children without the knowledge of the mother left the yard, went eight hundred feet down the street into a yard where workmen were felling trees, and were at once warned to move out of the way of the trees, that the girl went out of the yard into the street, where she was run over by the car about ten minutes after her mother last had seen her in the yard. *Held*, that there was evidence of due care on the part of the girl's mother. *Ingraham* v. *Boston & Northern Street Railway*, 451.

Invited Person.

5. A corporation, which operates an elevated railway and maintains an elevated terminal and transfer station, in the centre of which is a single track for its elevated trains constructed in a pit four feet below the surface of the station platform, and which also maintains a subway, crossing under this pit, by which passengers may pass from one side of the station to the other in order to take surface cars which are run from the ground to the level of the station platform on inclined tracks leading to the outward sides of the platform, does not invite passengers to cross from one side of the station platform to the other by using as bridges the platforms of the cars of an elevated train, which is standing in the pit with its gates open for the purpose of admitting passengers, merely because it does not forbid persons from crossing in this way when its servants see them doing

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it and tolerates such a practice without taking any active steps to prevent it. *Hillman* v. *Boston Elevated Railway*, 478.

Independent Contractor.

Evidence at trial of action by employee against employer for personal injuries, which was held to warrant finding that certain person through whose negligence plaintiff was injured was superintendent of defendant and not independent contractor, see *post*, 10.

Employer's Liability.

Assumption of risk by employee.

6. An experienced lineman does not assume the risk of an injury from a short circuit of electricity occasioned by a defective splice negligently made by his employer in a feed cable, when there is nothing on the surface of the cable to indicate the defect. *Greene* v. *Boston Elevated Railway*, 467.

Ways, works or machinery.

7. The tenant of the second floor of a three story building, who maintains a factory there, is not liable to one of his employees who is injured by reason of slipping on an accumulation of ice and snow on the steps leading to the ground from a platform attached to the first floor of the building, the platform and the steps being under the control of the landlord and used in common by the tenants of the three floors of the building, although the steps afford the only way by which the employees of the tenant maintaining the factory on the second floor can enter or leave the building, because such steps are not a part of the ways or works of such tenant which under the employers' liability act he is bound to keep safe for the use of his employees, nor is he liable at common law to his employees for the condition of the steps. *Hawkes* v. *Broadwalk Shoe Co.* 117.

8. In an action of tort against a corporation operating an elevated railway, by the administrator of the estate of a lineman in its employ, for the conscious suffering and death of the plaintiff's intestate, alleged to have been caused by a defect in a splice in a feed cable of the defendant with which a monkey wrench that the plaintiff's intestate was using came in contact and created a short circuit of electricity, there was evidence, elicited upon the cross-examination of one of the plaintiff's witnesses, which strongly tended to show that the cable containing the splice alleged to have been defective was so high above the nut on the end of the bolt of a dog clamp, which the plaintiff was grasping with the monkey wrench, that the wrench could not have come in contact with that cable and must have struck a lower cable, which was not shown to have been defective. It had to be admitted that the lower cable burned through and parted, while the spliced cable although burned did not drop, that the iron of the monkey wrench back of the jaws was in part melted, and that the top of the clamp was melted, facts which made it hard to believe that it was the spliced cable with which the wrench came in contact. But the physician, who attended

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the plaintiff's intestate, testified that the intestate told him that the monkey wrench hit the spliced cable, and that the matter with the cable which he hit with the monkey wrench was "that it was a new splice at that point," and there was no splice in the lower cable. *Held*, that in this conflict of testimony it was for the jury to decide what the fact was, and that the case properly was left to the jury. *Greene* v. *Boston Elevated Railway*, 467.

9. In an action, by the administrator of the estate of an experienced lineman against his employer, for the conscious suffering and death of the plaintiff's intestate, alleged to have been caused by a defective splice in a feed cable of the defendant, which when hit by a monkey wrench that the intestate was using created a short circuit of electricity, where it appears that the splice was a new one and was covered by fresh paint, and an expert testifies that striking a properly made splice in a feed cable with a monkey wrench would not have any effect, the question of the intestate's due care is for the jury. *Ibid.*

As to liability of employer at common law for injuries to employee resulting from dangerous or defective machinery or appliances, see *post*, 15–19.

Superintendence.

10. In an action, against a person alleged to have been the plaintiff's employer, for personal injuries caused by the collapse of a barn in process of construction, which had been erected negligently by one P., the defendant contended that P. was an independent contractor, and the plaintiff contended that P. was the defendant's superintendent. P. died before the trial. A witness testified that P. told him that he was "running the job," and that he was foreman. The plaintiff testified that he went to work on a certain day, that on the previous day he asked the defendant "for a job" on the barn and that the defendant said, "Go and see P.," to which the plaintiff answered, "I went to see him and he told me to come and see you, he wasn't hiring the men," and that the defendant then said, "Go and see him and tell him it is I told you to come there," that the plaintiff went to P. and was hired on that day and went to work on the morning of the next day. P.'s son testified that "the job started" on the day on which the plaintiff testified that P. hired him, and the defendant testified that the contract with P. was made on the morning of the next day, on which the plaintiff testified that he went to work. So far as appeared, the only agreement of hiring which the plaintiff made was that to which he testified as above. There was evidence that after the accident by which the plaintiff was injured the defendant took the plaintiff home in his buggy, or hired his brother to do so and paid him for it. *Held*, that there was evidence that the plaintiff's injuries were caused by the negligence of a superintendent of the defendant, which warranted a verdict for the plaintiff. *Trepannier* v. *Cote*, 484.

11. In an action by a roofer against his employer for injuries sustained in falling from the roof of a building while engaged with two others in laying "paroid" paper thereon, it appeared that the building was two

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hundred feet long and had a pitched roof, that its eaves were fifty feet above the ground, that the work was begun at the ridge pole and the paper was laid parallel to the ridge pole in strips three feet wide, that while the men were standing upon a bracket staging a few feet below the eaves, engaged in laying the lowest strip, a gust of wind tore the paper from the hands of the other two men stationed at each end, wrapped the paper around the plaintiff, who was stationed between the two, and hurled him to the ground. There was evidence that one of the other two men, who was acting as a temporary substitute for the superintendent, had ordered that this last strip should not be tacked temporarily to the roof as it was unrolled. *Held*, that, in view of the facts above stated and of other evidence in the case as to the velocity of the wind, the size, weight and texture of the paper and the length of the strip unrolled, the questions, whether the order was given, whether, if given, it was a negligent order and whether the injury to the plaintiff was caused thereby, were for the jury. *Carney* v. *A. B. Clark Co.* 200.

12. In an action by an experienced workman against his employer, for personal injuries caused by a heavy casting falling upon him owing to the breaking of a hook attached to a chain by which the casting was being hoisted, a count of the declaration under the employers' liability act alleged negligence of a superintendent, and the plaintiff contended that the accident was due to a sudden strain brought upon the hook by a slipping of the casting in the chain by reason of the chain having been hitched improperly. There was evidence warranting findings that the chain was placed around the casting by the plaintiff in the manner ordered by a superintendent in charge of the work, that the manner was improper because the casting was likely to slip in the chain and the hook was placed unfavorably to sustain the sudden weight likely to come upon it by such a slipping, and that the breaking of the hook was due to such a slipping of the casting by which the hook was subjected suddenly to an unusually heavy strain coming at an unusual angle. *Held*, that the questions, whether the plaintiff, an experienced workman, in adjusting the chain and the hook acted under the order of the superintendent and whether this order was negligent, were for the jury, and that accordingly the issue presented by the count of the declaration alleging negligence of a superintendent properly was submitted to the jury. *Sullivan* v. *Reed Foundry Co.* 280.

Evidence held not sufficient to show that injury to employee working at machine for sewing on buttons was caused by negligence of superintendent in failing to warn or instruct employee, see *post*, 17.

Construction of R. L. c. 106, § 71, cl. 2, as to whether words "of a person acting as superintendent with the authority or consent of such employer," meant that such substitute's sole or principal duty shall be that of superintendence, see EMPLOYERS' LIABILITY ACT, 1.

Elevated train.

13. The motorman of a surface car, operated by a corporation which also operates an elevated railway, is not a person in charge or control of an

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"elevated train" within the meaning of R. L. c. 106, § 71, as amended by St. 1908, c. 420, when he is running the car up an incline to discharge passengers to be transferred to trains running on the corporation's elevated railway and to receive passengers transferred to the car from trains running on such elevated railway, and, if the conductor of another like surface car, operated by the same corporation, is injured through the negligence of such a motorman while thus running the car up the incline, his only remedy is against the motorman. *Dow* v. *Boston Elevated Railway*, 486.

14. Whether the provision of St. 1908, c. 420, amending R. L. c. 106, § 71, that "an elevated car which is in use by or which is in possession of an elevated railway corporation, shall be considered as a part of the ways, works or machinery of the corporation which uses or has it in possession," includes a surface car operated by a corporation, called an elevated railway company, which operates both elevated railways and surface lines, while such car is being used to connect with trains running upon the elevated structure, here was referred to as a question which did not arise in the present case. *Ibid.*

Defective or dangerous machinery or appliances.

15. Boyd *v.* Taylor, 195 Mass. 272, and 202 Mass. 213, affirmed. *Boyd* v. *Taylor*, 335.

16. At the trial of an action against the proprietor of a sausage factory by an employee therein, in which the plaintiff sought to recover for injuries alleged to have been caused by his arm being drawn into a meat chopping machine due to a failure of the defendant to warn or instruct him as to that danger, where a material question was, whether the danger was an obvious one, it appeared that the plaintiff, several months after his injury, had returned to the factory, and there was evidence tending to show that at that time the machine was in the same place, set up in the same way and being operated for the same purpose as at the time of the injury to the plaintiff. There was no evidence that the condition of the machine had been changed. The plaintiff, subject to an exception by the defendant, was allowed to testify that, in looking into the machine to see the feed screw when the machine was running as it had been when he was operating it, there was not much that could be seen other than a kind of blur. *Held*, that the evidence was relevant, material and competent. *Ibid.*

17. At the trial of an action by a girl twenty years of age against her employer to recover for injuries caused by the breaking of a needle on a machine, which the plaintiff was operating, for sewing buttons on shoes, it appeared that the machine was similar to an ordinary sewing machine except that there was attached to its top a can, connecting by a chute with the needle, for feeding buttons in proper positon to the needle automatically. The plaintiff testified that she had worked upon the machine about a month, after having been shown how to operate it by an employee of the manufacturer of the machine, that she knew needles would break easily, and that they sometimes had broken when she pulled the thread down; that four days before the accident the automatic button feed did not work properly, and a representative of the manufacturer of the machine

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had repaired it, after which it worked properly during the remainder of that day, that the machine was not operated again until the morning of the accident when "the buttons seemed to come down in the foot, and the foot held," the needle broke, and the plaintiff was injured. *Held*, that there was no evidence which would have warranted a finding that the breaking of the needle was caused by a defect in the machine, since the cause of the accident was left a matter of conjecture and speculation, nor was there evidence of a negligent failure of the defendant to warn or to instruct the plaintiff, nor of negligence of a superintendent of the defendant. *Sheehan* v. *Goodrich*, 99.

18. It is the duty of an employer of a teamster, in supplying him with a strap with which to bind the load on his wagon, to furnish a strap which is reasonably safe when used for the purpose intended, and, if the strap breaks while being thus used a week after its worn condition has been called to the attention of the employer's superintendent, and the teamster in consequence is injured, in an action against the employer for the injuries thus caused there is evidence of the defendant's negligence. *Haley* v. *Lombard*, 545.

19. In an action, by the administrator of the estate of a teamster, for the conscious suffering and death of the plaintiff's intestate while in the employ of the defendant, by reason of the breaking of a strap, when the plaintiff's intestate was hauling it tight around his load with his foot braced against a wheel of his wagon, there was evidence that about a week before the accident the plaintiff's intestate showed the strap to the defendant's superintendent and called his attention to its weakness, and that the superintendent, after examining the strap, said, "That will hold all the load you ever put on your wagon." There was testimony that after the accident the plaintiff's intestate said that he supposed that the superintendent knew better about the strap than he did, and that he let it go at that. It appeared that, when the strap broke, the intestate's wagon was in a street, which adjoined a great market and was lined with teams on both sides, leaving a space for other teams to pass through in the middle, and that the plaintiff fell backward into this space and was run over by a loaded team. There was no evidence in regard to the condition of the strap at the beginning of the employment of the plaintiff's intestate. *Held*, that there was evidence of due care on the part of the plaintiff's intestate, and that the question, whether he assumed the risk of such an accident by voluntarily exposing himself to danger, was for the jury. Distinguishing Davis *v.* Forbes, 171 Mass. 548. *Ibid.*

As to statutory liability of employers for injuries to employee caused by certain defects in ways, works or machinery, see *ante*, 7–9.

Action by employee for injuries received while riding on elevator, which could not be maintained because plaintiff was not in exercise of due care, see *post*, 39.

In action by employee against employer, certain expert evidence, as to what is and what is not suitable appliance for keeping plank, while it is being lowered by derrick, from swinging and striking plaintiff, was held to be admissible, see EVIDENCE, 10.

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Whether verdict for defendant, in action of tort for personal injuries by employee against employer on count under R. L. c. 106, § 71, cl. 1, and verdict for plaintiff on count at common law alleging defective and dangerous machinery as cause of plaintiff's injuries, were inconsistent, was held not to have been raised by exceptions taken by defendant, see PRACTICE, CIVIL, 17.

Dangerous place.

Employee unable to recover from employer for injuries received because of snow and ice on step, which afforded only means of entering or leaving employer's premises, if step were not under control of employer, see *ante*, 7.

Failure to warn.

Evidence held not sufficient to show that injury to employee working at machine for sewing on buttons was caused by failure to warn employee as to liability of needles to break, see *ante*, 17.

Street Railway.

In general.

20. A constant stopping and starting of an electric street car with a jerky movement to avoid collisions with persons, vehicles and cars as the car passes along a public street in front of a theatre from which crowds are emerging after an evening performance does not in itself constitute evidence of negligence on the part of the motorman. *Craig* v. *Boston Elevated Railway*, 548.

Other general principles of liability, see *post*, 24, 29, 33.

Injuries to persons on highway.

21. In an action by a bright boy about eight years of age for injuries caused by his hand being run over by a street car which was crossing at right angles a steep street down which he was coasting at ten o'clock in the morning of a day in December, there was evidence tending to show that at the intersection of the two streets there were buildings covering all the land at the street corners so that the motorman's view as he approached the intersection of the streets was somewhat cut off, that the plaintiff was preceded down the hill by another boy coasting, who, seeing the car, turned to pass in front of it, that the motorman, seeing the first boy, to prevent running over him stopped or almost stopped his car in the middle of the street down which the plaintiff was coasting, that the plaintiff observing the movements of the boy preceding him, turned his sled to go around the rear of the car, and, because of the unexpected stopping or lessening of the speed of the car, came into collision with it so that his hand was run over by the rear wheel. *Held*, that there was no evidence of negligence on the part of the motorman. *Kiley* v. *Boston Elevated Railway*, 542.

22. At the trial of actions against a street railway company for the conscious suffering and death of a girl three years and four months of age, caused by her being run over by an electric street car of the defendant, it appeared that the accident happened on an ordinary village street, not thickly set-

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tled, where there was a single straight track. Two persons in a yard beside the track, who were engaged in cutting down a tree, testified that they saw the child standing near and warned her away, that she thereupon left the yard and went out upon the track on her way home, the car then being about one hundred and fifty feet away, and that there were no leaves on the track. One of the men testified that when he last saw the child, just before the accident, she was walking along the track with her back toward the car, and that the motorman, as he approached, was not looking at the track but at the men chopping the tree. The motorman testified that he saw the child approaching the track when he was from one hundred and fifty to two hundred feet away, and saw her on the track when he was one hundred and twenty-five feet away, and that then the car was running about four and a half miles an hour on a slight down grade, that he put on the brakes and reversed the car, but could not stop in time because the rails were slippery owing to the presence of leaves, that the brakes and reverse were in good order, and that by tests made by him after the accident he found that the car, when going four miles an hour on a grade, could be stopped in about twenty-five feet. *Held*, that the jury would have been warranted in believing the motorman's testimony as to the distance he was from the child when he first saw her and as to the distance within which the car under like conditions of grade and speed could have been stopped if the tracks were not slippery and the stopping gear were in good order, and the testimony of the men who were cutting the tree that there were no leaves on the track, and therefore would have been justified in finding that the brakes or reversing machinery of the car were out of order and that the defendant as a corporation was negligent; or that the jury might have disbelieved the motorman's testimony as to his effort to stop the car and have believed that the brakes and reversing machinery were in good order, that the car might have been stopped within twenty-five feet, that there were no leaves on the rails, and that the motorman saw the child with her back toward the car in time to prevent the accident, in which case they would have been warranted in finding the motorman guilty of gross negligence. *Ingraham* v. *Boston & Northern Street Railway*, 451.

Injuries to passengers: in entering car.

23. In an action against an elevated railway company, which operated and maintained an elevated station and also street railway lines and caused certain street railway cars to enter the station at the elevated level, for injuries received by a woman who in attempting to enter a surface car on the elevated level stepped into a space between the platform and the entrance step of the car, there was evidence tending to show that the defendant had made provision for two closed surface cars to enter the station upon a certain track, discharge their passengers by their front doors, and receive new passengers by their rear doors, that the platform furnished by the defendant was ample for the accommodation of two such cars, but that beyond the point where the rear of the second car properly would stand, the platform terminated with a curved end having a radius of about

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twenty-four inches; that the car which the plaintiff attempted to enter did not stop at the place provided for it but did stop with its rear step, which was about thirty-six inches long, so placed that only about eight inches of the forward part of it was opposite the straight edge of the platform and the platform curved away from the rest of the step with the curve above described. There also was evidence tending to show that the plaintiff was familiar with the station and the customs as to its use, and that she noticed that the car in question had not come up to its regular stopping place, that when she attempted to enter the car she was preceded by a crowd who entered safely, and that owing to the compactness of the crowd she did not look down and did not know of the position of the step. It was not clear whether she stepped off the end of the platform or between the curving part of the platform and the step of the car. *Held*, that there was evidence for the jury of due care on the part of the plaintiff, and also of negligence on the part of the defendant in failing to bring the car wholly along side of the straight portion of the platform before the passengers were allowed to enter. *Brisbin* v. *Boston Elevated Railway*, 553.

Injuries to passengers: crowded cars.

24. In the present state of transportation facilities it is not negligence for a corporation operating a street railway to permit passengers to come upon its cars when they already are crowded. *McCumber* v. *Boston Elevated Railway*, 559.

25. A woman, who voluntarily becomes a passenger upon a street car so crowded that she knows that she cannot get a seat and may be obliged to stand in the vestibule, assumes whatever obligation and risk are incident to the crowded condition of the car. *Ibid.*

26. In an action, by a woman against a corporation operating a street railway, for personal injuries caused by being pushed by a stream of alighting passengers from the rear platform of a crowded car of the defendant on which the plaintiff was a passenger, if it appears by the plaintiff's testimony that the car was excessively crowded and that the plaintiff was standing in the doorway between the body of the car and the vestibule with one foot in the doorway and the other in the vestibule, that she knew by the ringing of the bell and the diminishing speed of the car that persons inside were intending to get out, that she saw them begin to push their way to the door or move down the car "as they always do," and that the conductor, who was standing inside the car collecting fares near the plaintiff, told the plaintiff that she was blocking the passageway and that she must make room for the other passengers to alight, that she tried to push back into the vestibule, but that it was so crowded that there was no room for her there, that persons on the step and a man beside her got off and left a narrow passageway, and that while she was turning around and trying to see what she could do the crowd surged against her, and she felt herself going off the car, there is no evidence for the jury of negligence on the part of the defendant. *Ibid.*

27. In an action, by a woman against a corporation operating a street railway, for personal injuries caused by being pushed by a stream of alighting

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passengers from the rear platform of a crowded car of the defendant on which the plaintiff was a passenger, where it appears that the plaintiff was standing directly in the doorway between the body of the car and the vestibule through which the passengers were obliged to pass in alighting, so that the other passengers could not pass unless she moved, and that the conductor told her that she was blocking the passageway and must make room, it is proper for the presiding judge to refuse to permit the plaintiff to testify that the tone of voice in which the conductor told her that she was blocking the passageway and asked her to move was harsh and loud, and caused her to be agitated and mentally disturbed, because perturbation of mind produced solely by the inflection of a voice in the course of necessary speech, unaccompanied by threat of speech or gesture, is not an element of liability. *McCumber* v. *Boston Elevated Railway*, 559.

Injuries to passengers: collisions.

28. In an action against a street railway corporation for personal injuries sustained while the plaintiff was being transported as a passenger in an open electric car of the defendant, there was evidence, that the car came in collision with a horse and wagon at the junction of two intersecting streets, that the car could not be seen by travellers on the intersecting street nor could the motorman of the car see such travellers until the car nearly had reached the corner, that the collision occurred about twenty-five feet from the point where the motorman first came in sight of the wagon, that the rate of speed of the car was seven or eight miles an hour, that two persons who were in the wagon heard no bell or gong sounded, that the force of the collision threw the horse to the ground, and that the plaintiff, while either rising or turning in her seat to signal to the conductor, was thrown by the jolt of the collision against the edge of the seat and was injured. It further appeared that the collision took place in broad daylight on an unobstructed street. *Held*, that there was evidence of negligence on the part of the defendant toward the plaintiff as a passenger. *Doherty* v. *Boston & Northern Street Railway*, 27.

Injuries to passengers: jerks, jolts and lurches of cars.

29. Statement by LORING, J., of the principles of law governing the liability of companies operating electric cars for injuries caused to passengers by jerks occurring when cars are stopped or started, jolts occurring as cars are run over switches or frogs, and lurches occurring as cars are run around curves, with a collection of the recent decisions of this court on the subject. *Work* v. *Boston Elevated Railway*, 447.

30. In an action by a passenger against a street railway company for personal injuries caused by the sudden starting of a car as the plaintiff was walking toward the door preparing to alight, there was evidence tending to show that, when there were but two persons on the car, the plaintiff had signalled the conductor to stop the car and the conductor had assented; that, after the car had stopped, the other passenger got off first and the plaintiff, having gathered his bundles together under his right arm, started for the door when, seeing the conductor reach for the bell rope to signal for the starting of the car, he seized a hanging strap with his left hand with a

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"pretty good hold" before the car started in order to guard against being thrown, but that the car was started with such a "jump," that the plaintiff lost his hold upon the strap, was "twisted" around and "landed right down in the corner" eight or ten feet away. *Held*, that, while the conductor's negligence in starting the car under the circumstances before the plaintiff had alighted did not cause the injury to the plaintiff because the plaintiff had warning of it and an opportunity to steady himself against an ordinary starting of the car, and while there was no direct evidence as to what the motorman did in starting the car, there was, in the effect upon the plaintiff, indirect evidence that the car was started negligently; and that therefore the case was for the jury. *Work* v. *Boston Elevated Railway*, 447.

31. At the trial of an action against a street railway company by a woman, who as she was about to take a seat in a closed electric car of the defendant was thrown to one side upon another passenger by an alleged sudden starting and jerking of the car, the plaintiff and two other witnesses testified for the plaintiff. The plaintiff testified that as she was facing toward the side of the car and was in the act of sitting down, she first was thrown forward with a sudden jerk and then jerked back and that one of her companions, another witness, who was standing, was not thrown but would have been if she had not been holding on to a strap. The companion referred to testified that the accident happened at 11.30 in the evening and that people were going home from the theatre, that there were a number of jerks of the car near together violent enough to take one off one's feet, but that she was not taken off her feet because she recovered herself by taking hold of a strap. The third witness, another companion of the plaintiff, similarly described the movements of the car and testified that she saved herself from being thrown by taking hold of the door frame. *Held*, following McGann *v.* Boston Elevated Railway, 199 Mass. 446, that there was no evidence of so unusual a movement of the car as to warrant a finding that the motorman was negligent. *Craig* v. *Boston Elevated Railway*, 548.

32. At the trial of an action by a woman against a street railway company to recover for injuries alleged to have been caused to the plaintiff by her having been thrown down by the stopping with an unwarranted jerk of a car of the defendant which she was about to leave, there was testimony by witnesses of the plaintiff tending to show that she signalled the conductor to stop the car and rose and stood in the aisle grasping with a firm hold handles on the ends of seats on each side of the aisle running at right angles to the aisle, that the car did not stop at the place intended, that the conductor thereupon gave another signal to the motorman, that the car then stopped so suddenly as to break the plaintiff's hold upon the handles and to throw her to the floor of the car. The conductor testified that, before reaching the stopping place where the plaintiff desired to leave the car, the motorman lessened the speed of the car to cross some switches, then applied the power and started forward and, upon receiving the conductor's second signal, applied air brakes too quickly. *Held*, that there was evidence warranting a finding that the motorman was negligent in the operation of the car. *McCarthy* v. *Boston Elevated Railway*, 551.

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Injuries to passengers: from acts and conduct of persons other than company's employees.

33. Statement by RUGG, J., of the principles of law governing the liability of street railway companies for personal injuries received by their passengers and due, not to the instrumentalities or employees of the companies, but to acts and conduct of other passengers or strangers. *Glennen* v. *Boston Elevated Railway*, 497.

34. At the trial of an action against a street railway company to recover for injuries, received while the plaintiff was a passenger upon an open electric car of the defendant and caused by the conduct of a crowd which rushed upon the car and turned over seats, evidence tending to show that similar crowds acting in the same way customarily entered the defendant's cars at the same place and time of day and week and season of the year is relevant and material, since it tends to show that the defendant knew and had had an opportunity to guard against the condition which was the cause of the plaintiff's injury. *Ibid.*

35. At the trial of an action by a woman against a street railway company to recover for injuries received while the plaintiff was a passenger upon an open electric car of the defendant on a Sunday afternoon in the summer, there was evidence tending to show that when the car reached a certain point which was near to a place of public resort by a river, it stopped for the purpose of having the trolley reversed and the backs of seats turned over preparatory to returning over its course, that the plaintiff, a woman, rose with a child in her arms to leave the car but was prevented from doing so by an on-rushing crowd who began turning over the backs of seats in the car and finally turned over the back of a seat against which the plaintiff was leaning and pinned her arm between the back and the seat; that while the crowd so was acting the motorman was on the front platform and the conductor on the rear platform and a person in the employ of the defendant called a "starter" was standing ten feet away. The place where the car stopped was a public street. Evidence was offered by the plaintiff tending to show that such crowds were customary at that place, time of day, week and season. Such evidence was excluded and a verdict was ordered for the defendant. *Held*, that the evidence should have been admitted and that the verdict for the defendant should not have been ordered, because there was evidence tending to show that the defendant, knowing of the danger to the plaintiff, had failed to exercise the care it should have exercised to guard her from injury; and that the fact that the conduct of the crowd was in a public street was of no consequence, since the question was not one of policing the public way, but of shielding a passenger. *Ibid.*

Injuries to passengers: in leaving car.

36. At the trial of an action against a street railway company for personal injuries alleged to have been due to the plaintiff slipping on the step of a closed electric car of the defendant because of an accumulation of mud and slime thereon, there was evidence of the presence of the mud on the step when the plaintiff entered the car and when she left it a mile farther

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on, and that the defendant had made rules and given instructions to the conductor in charge of the car in question making it his duty to clean the step and put upon it sand provided for the purpose whenever that was necessary to prevent passengers from slipping, even if the slippery condition was caused by the natural tracking of mud upon the steps during the trip of the car. *Held*, that there was evidence of negligence on the part of the conductor in failing to obey the rules of the company and the instructions given to him. *Kingston* v. *Boston Elevated Railway*, 457.

See also *ante*, 33–35.

Elevated Railway.

Action to recover for injury to passenger in boarding surface car in station of elevated railway company, see *ante*, 23.

Elevated railway held under certain circumstances not to have invited passengers in its station to pass through its cars to cross pit in which trains ran and thus to reach other side of station, see *ante*, 5.

Railroad.

Injury to person in railroad yard.

37. In an action against a railroad corporation by the driver of a meat wagon, who had been sent by his employer to unload beef from a car standing on a track in a freight yard of the defendant, it appeared that the plaintiff, seeing the driver of another team struggling to restrain a plunging horse upon or close to a track of the defendant on which a train was approaching, went to the assistance of such other driver for the purpose of rescuing him from impending danger and in doing so was run over by the train and was injured, and it was held that there was evidence for the jury that the plaintiff was in the exercise of due care. There was evidence, upon the question of the negligence of the defendant, that the train which ran over the plaintiff was coming into the defendant's freight yard past an open space about forty feet wide, which was paved and was adapted by the defendant to be used as a driveway by teams coming to the yard to unload cars standing upon the tracks that bordered its sides, that this open space was in frequent if not in constant use for this purpose, that the train which injured the plaintiff came in upon the track at one side of the driveway with an unusual noise of puffing, which was likely to frighten and did in fact frighten the horses near the track, and that the engineer and the fireman by keeping a proper lookout as they approached the driveway would have seen that a frightened horse was struggling with his driver on the track in a position which threatened grievous injury to the driver. There also was evidence that before the accident the train had come to a stop or almost to a stop before the plaintiff went upon the track to the assistance of the driver in danger, that the engine then was so near the spot that proper watchfulness exercised by the engineer or the fireman would have disclosed the situation to them at once, and that the train then started up without any notice or warning and struck the plaintiff. There also was evidence that the engineer was the only man in the cab of the

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engine. *Held*, that there was evidence for the jury of negligence on the part of the servants of the defendant. *Dixon* v. *New York, New Haven, & Hartford Railroad*, 126.

Principle governing above decision, see *ante*, 1, 2; *post*, 46.

Injury to passenger.

38. At the trial of an action against a railroad corporation, operating a train by electricity, for personal injuries alleged to have been caused by the closing upon the plaintiff's fingers of a door between the smoking and baggage compartments of a combination car through which the plaintiff was passing in leaving the train after it had stopped at a station, it appeared that the door had a catch at the bottom designed to hold it open and an arrangement at the top designed automatically to close it when it was not held open, and there was evidence that some one other than an employee of the defendant opened the door, that when the plaintiff reached it it was open and "neither swinging nor moving," and that as he put his hand on the door jamb to steady himself in turning round, no one having touched the door to close it, it came to upon his fingers. There was no direct evidence that the catch was defective. The defendant's baggage master testified that it was his duty to open the door when the train stopped, and that he did not do it on this occasion because it already had been opened. A verdict was ordered for the defendant. *Held*, that the verdict was ordered rightly, because on the evidence it was conjectural whether the door swung to because of a defect in the catch or because it was not properly set on the catch by the person who opened it, and because there was no evidence that the baggage master was under any duty to see that the door was set back properly when it was opened by some one other than an employee of the defendant. *Casey* v. *New York, New Haven, & Hartford Railroad*, 443.

Maintenance of fence.

What is "suitable fence" which railroad company under St. 1906, c. 463 Part II. § 103, must maintain, see RAILROAD, 2, 3.

In Use of Highway.

Whether one, who was injured because of hole in earth sidewalk, is precluded from recovery from municipality under R. L. c. 51, § 18, because he had passed over hole before on same day as accident, see WAY, 11.

Action by boy against street railway company, for injuries received by his running into car while he was coasting upon highway, see *ante*, 21.

In Use of Elevator.

39. In actions by a boy twenty years of age against his employer and the owner of the building in which he worked, for personal injuries incurred while he was transporting himself and another employee of the defendant to an upper story of the building upon a freight elevator, which he found unemployed and which the defendant's employees were accustomed to use for their own transportation when not otherwise in use, it appeared that

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the plaintiff's injury was caused by the catching of his heel, which must have projected over a strip of wood about two and a half inches wide and two and a half inches high bolted to the edge of the platform of the elevator, that the platform was about five feet square, that the plaintiff told his companion to stand in the middle of it and that he stood facing her a little way from her, that the plaintiff was relating to his companion his experience when he was at a theatre with a lot of other boys and a policeman took him by the arm and pulled him backward, and he testified that when he had reached this point in his story the accident happened. He also testified that a sudden jolt caused him to step backward to recover his balance and that the next thing that he remembered was that his foot was caught. It appeared that, whatever the vibration or jolting of the elevator was, it was something with which the plaintiff was perfectly familiar and that he knew the dangers which might result from this motion to a person who stood near the edge of the platform if he did not stand firmly, and in his testimony he failed to show that he was taking any care for his safety or giving any attention to his position upon the elevator in reference to putting his foot over the edge of the platform. The only person besides the plaintiff who saw the accident was his companion, who testified that the accident happened immediately after the plaintiff, in telling about the policeman, put up his hand and said, "Gee, but he gave me an awful rap," and that she did not notice whether his foot was on the joist or not or whether he had hold of anything. *Held*, that there was no evidence for the jury that the plaintiff was in the exercise of due care, and that a verdict properly was ordered for the defendant. *Green* v. *Tarr*, 111.

In Use of Coal Hole.

40. In the absence of any custom or understanding in regard to the matter, there is no rule of law which requires a coal dealer, when by his servant he has been delivering coal or coke through a coal hole in a public sidewalk on the premises of a customer, to see that the cover of the coal hole is replaced, when the customer himself as the owner or the occupant of the premises has undertaken in person or by his servant to attend to the removal and the replacement of the cover. *Gillis* v. *Cambridge Gas Light Co.* 238.

41. If the driver of a team of a coal dealer, who has been instructed by his employer not to remove or replace or touch any covers of coal holes and not to attempt to sweep or clean any rims of coal holes into which covers fit, while engaged in delivering coal or coke through a coal hole in a public sidewalk on the premises of a customer of his employer, who as the owner or occupant of the premises has undertaken in person or by his servant to attend to the removal and the replacement of the cover, joins with the servant of the owner or occupant in undertaking to replace and secure the cover of the coal hole and does this negligently, causing injury to a person travelling on the highway in the exercise of due care, it here *was intimated*, that the coal dealer perhaps might be held liable for the consequences of his servant's negligence. *Ibid.*

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In Use of Electricity.

Questions which arose in action for conscious suffering and death of lineman employed by elevated railway company, see *ante*, 6, 8, 9; EVIDENCE, 11–14.

In Use of Dangerous Horse.

Liability of owner, and of agent of owner, of dangerous horse, known to both to be animal unsafe to be used in public streets, for injuries resulting from horse running away, see ANIMAL, 1, 2.

In Work upon Roof of Building.

Action by employee against employer for injuries resulting from plaintiff being pushed from roof of building by piece of roofing paper which he was helping to lay thereon and which wind blew from fellow workmen, see *ante*, 11.

Of Marketman.

Action against marketman for injuries sustained by married woman from tack in leg of lamb alleged to have been purchased for her by her husband for food, where only question decided was whether there was evidence that husband acted as wife's agent in making purchase, and this court intimated that action could have been maintained on ground of violation by defendant of duty to see that nothing was left embedded in lamb which would cause injury to any person preparing it for food with reasonable care, see AGENCY, 1.

In a Factory.

Evidence, at trial of action by employee in shoe factory against employer to recover for injuries caused by breaking of needle on machine for sewing on buttons at which plaintiff was working, which was held to leave cause of accident too conjectural to warrant submission of case to jury, see *ante*, 17.

In Freight Yard.

Action against railroad company for injuries received by plaintiff while attempting to rescue another person threatened with injury through negligence of defendant's servants, see *ante*, 1, 2, 37.

In Blasting.

42. At the trial of an action of tort for personal injuries alleged to have been caused by negligence of the defendant's servants in blasting rock, there was evidence that the rock being blasted was seven hundred and fifty feet from the plaintiff's house, and that there was no covering put over the rock at the time of a certain blast that was described by a witness as a "great explosion which shook the barn," and which threw a piece of rock weighing twenty pounds into the plaintiff's house, causing the injuries to

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the plaintiff. *Held*, that the question whether the servants of the defendant were negligent was for the jury. *Driscoll* v. *Gaffey*, 102.

43. Where, at the trial of an action of tort for personal injuries alleged to have been caused by negligence of the defendant's servants in blasting rock, there was evidence of such negligence in the blasting besides the mere fact of a rock being hurled seven hundred and fifty feet into the plaintiff's house, and the presiding judge in his charge told the jury that the burden of proving such negligence was upon the plaintiff, and that upon the question of negligence they were not to take into account the results of the blast, but on the contrary were to judge of the negligence by the situation just before the blast, it was *held*, that the defendant had no ground for a contention that the jury were allowed to find for the plaintiff by an application of the doctrine of *res ipsa loquitur*. *Ibid.*

44. At the trial of an action of tort by a woman for personal injuries, it appeared that through negligence of the defendant in blasting rock a large piece of rock was hurled seven hundred and fifty feet into the plaintiff's house, and a question was whether the defendant was exempt from liability because the plaintiff's injuries were merely from fright, terror, alarm, anxiety or distress of mind, unaccompanied by any injury to the person from without. The plaintiff testified in direct examination that she had left her pantry to go to a closet and was just coming from the closet when it seemed that she was thrown over on the floor, that the closet door hit her, but that she did not think it was the force of the door that threw her, that it seemed as if the house was falling in, that immediately afterward she went into the kitchen, saw everything upset, everything thrown around the closet, the sink and the stove, that she did not know that there was any rock there until her son found it, and that there were no marks on her body from contact with anything. On cross-examination she testified that she "could not say positively whether the door hit" her or not. The plaintiff's attending physician testified in substance that he saw her the next day, that "her condition was one of nervous shock," that he "called the trouble neurasthenia . . . what the ordinary layman would call a nervous breakdown from the shock," that "the fright she sustained . . . was an adequate cause for this injury, and the nervous shock was due to fright, and so the nervous shock is the cause that I attribute to the condition, and the only cause." *Held*, that, in spite of the physician's testimony, the jury might have found that the plaintiff was violently thrown to the floor either by being struck by the closet door or in some other way due to the blast, that consequently there was a battery to her person, to which at least some of her physical troubles were in part attributable, and therefore that it was proper to refuse to rule that the action could not be maintained. *Ibid.*

Of Independent Contractor.

45. The owner of a carriage, who has not been negligent in failing to inspect it or in inspecting it negligently, is not liable for an injury resulting from a defect in it unknown to such owner and due to the negligence of a carriage maker, who had repaired the carriage under an independent contract

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which gave him entire control of the business of making such repairs as he thought necessary, to be paid for at a reasonable price. *Corliss* v. *Keown*, 149.

Proximate Cause.

46. In an action against a railroad corporation by a person who was run over by a train of the defendant when he was attempting to rescue another person from impending danger upon a track on which a train of the defendant was approaching, if the plaintiff was in the exercise of due care in incurring the risk of injury for the purpose of the attempted rescue, the defendant will be held liable if it was negligent either toward the plaintiff or toward the person whom he was attempting to rescue, because negligence toward such last named person will be treated as directly inducing the attempt to rescue him and thereby causing the injury to the plaintiff. *Dixon* v. *New York, New Haven, & Hartford Railroad*, 126.

Application of above rule, see *ante*, 37, 1, 2.

Joint Tortfeasors.

47. If a person, while being transported as a passenger on a car of a street railway corporation, is injured by reason of a collision of the car with a horse and wagon, which was caused by the concurrent negligence of the motorman of the car and of the driver of the wagon, the railway corporation operating the car is liable to the passenger for his injuries. *Doherty* v. *Boston & Northern Street Railway*, 27.

Res ipsa loquitur.

48. In an action for personal injuries caused by a heavy casting falling upon the plaintiff owing to the breaking of a hook attached to a chain by means of which it was being hoisted, where the plaintiff contends that the breaking of the hook was due to its own weakness, if it appears that the hook broke while holding a weight much less than a hook of that size, if sound, should have held, that fact unexplained is of itself evidence of a defective condition. *Sullivan* v. *Reed Foundry Co.* 280.

Action for personal injuries caused by flying rock due to blasting, where defendant was held not to have ground for contention that jury were allowed to find for plaintiff by application of rule *res ipsa loquitur*, see *ante*, 43.

Violation of Rule of Defendant.

Violation of rule of street railway company by conductor, which was held to be evidence of negligence, see *ante*, 36.

Matter of Conjecture.

Evidence, at trial of action by employee in shoe factory against employer to recover for injuries caused by breaking of needle on machine for sewing on buttons at which plaintiff was working, which was held to leave cause of accident too conjectural to warrant submission of case to jury, see *ante*, 17.

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Of Plaintiff in Suit in Equity.

Bill in equity which upon demurrer was held not to show such negligence on part of plaintiff as to bar suit, see EQUITY JURISDICTION, 13.

Causing Death.

Questions which arose in action for conscious suffering and death of lineman employed by elevated railway company, see *ante*, 6, 8, 9; EVIDENCE, 11-14.

Action for conscious suffering and death of teamster alleged to have been caused by breaking of strap which he was hauling about load on wagon, see *ante*, 18, 19.

Husband's Right of Action for Medical Attendance furnished Wife because of Defendant's Negligence.

See HUSBAND AND WIFE, 1.

Damnum absque Injuria.

Statement of, reason for and application of rule that there can be no recovery in action of tort for personal injuries, although it is proved that defendant has been negligent, unless plaintiff has been injured "from without," see ACTIONABLE TORT, 2; *ante*, 44.

NEW TRIAL.

See PRACTICE, CIVIL, 8, 9; CONSTITUTIONAL LAW, 10, 11; HOMICIDE, 20.

NUISANCE.

1. In an action of tort for damages alleged to have been caused by the maintenance of a nuisance which the defendant refused to discontinue when notified by the plaintiff to do so, it appeared that the plaintiff and the defendant were the owners of adjoining lots of land upon a city street, that when the plaintiff bought his land there stood upon the land of the defendant a brick building, erected nine years earlier, of which the wall above ground on the side toward the plaintiff's land extended to the boundary line, that the plaintiff in excavating for the foundations of a brick building to be built upon his own land discovered that all along the dividing line the foundation stones of the defendant's building projected irregularly into the plaintiff's land from ten to twelve inches and interfered materially with the construction of the plaintiff's building, that the defendant on notice from the plaintiff, after a delay which was alleged to have caused loss to the plaintiff, caused the stones to be cut off up to the dividing line, except for a distance of twelve or fourteen feet near the front of the properties, where the building inspector of the city refused to allow this to be done on the ground that it would weaken the wall of the defendant's building, and that the projections thus remaining caused the plaintiff

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additional expense in the erection of his building. *Held*, that, although the plaintiff could not sue for the original trespass, because he was not the owner of the land encroached upon at the time the trespass was committed more than six years before the date of the writ, the maintenance of the projecting stones by the defendant constituted successive or continuing trespasses or nuisances for which the plaintiff could maintain an action to recover any damages caused to him thereby. *Milton* v. *Puffer*, 416.

Burden of proving justification for such trespass because of agreement with plaintiff's predecessor in title is upon defendant, see EVIDENCE, 3.

Whether there is other right of action than one for negligence, in case of injury to one from rock caused to fly from blasting operations, see ACTIONABLE TORT, 1.

OFFICER.

Action of judge of Superior Court in allowing motion of deputy sheriff to amend return made by him on execution so that it would read that he levied on interest of debtor in certain real estate at time of certain attachment instead of at time of levy, which was held to have been within judge's power and to have been warranted, see EXECUTION, 2.

Regarding certain public officers, see MUNICIPAL CORPORATIONS, 1–6.

PARENT AND CHILD.

See NEGLIGENCE, 4.

PARK COMMISSIONERS.

Respective duties of tree wardens, foresters and park commissioners in regard to shade trees, bushes or other trees than shade trees in towns and cities, see MUNICIPAL CORPORATIONS, 4.

PASSENGER.

Action by passengers against elevated, street railway and railroad companies for personal injuries, see NEGLIGENCE, 5, 23–36, 38.

PATENT.

1. Cases cited by SHELDON, J., upon the point that an inventor or his assignee before the issuing or the allowance of a patent has an inchoate right of property in his invention and in a pending application for a patent, which he may assign or otherwise deal with as an article of property. *Richardson Shoe Machinery Co.* v. *Essex Machine Co.* 219.

Construction and enforcement of contract concerning machine in process of construction embodying inventions and improvements of certain inventions, and patents to be procured thereon, see CONTRACT, 6, 10; EQUITY JURISDICTION, 2–4.

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PAYMENT.

1. In an action by a builder against a landowner for the value of labor and materials furnished by the plaintiff in the construction of a building on the defendant's land at his request, it appeared that the plaintiff and the defendant, being deceived by a fraudulent architect, supposed until the building was completed that they had made a contract for its construction, that the architect fraudulently had procured and delivered to the plaintiff and to the defendant what purported to be duplicate originals of a contract for the construction of the building, that in the instrument held by the plaintiff the price was stated to be $33,000 and in that held by the defendant it was stated to be $23,000, that thereafter the architect volunteered to give and gave to the plaintiff certain promissory notes, signed by the architect, on account of sums apparently due under the instrument held by the plaintiff which stated the larger price, at a time when nothing was due under the terms of the instrument held by the defendant which stated the smaller price, that all the dealings of the parties pertaining to the contract were through the architect and that the plaintiff and the defendant never met, that when the notes were received by the plaintiff from the architect the plaintiff supposed that they were to be applied in part payment of the price named in the instrument held by him, but that afterwards by direction of the architect he applied the notes upon a contract between him and a third person, which was in charge of the architect and on which the plaintiff was entitled to payments, that the architect had no authority from the defendant to make these payments, and that the defendant had no knowledge of the giving of the notes until after they had been applied by direction of the architect upon the contract with the third person. There was no evidence that the defendant ever ratified the giving of the notes as payments made in his behalf, and on the contrary it appeared that the defendant repudiated all liability, at any time, for any sum beyond the amounts paid by himself. The defendant asked for instructions to the jury that he should be credited with the amount of the notes, and that, the notes having once been applied as payments upon a contract purporting to have been made in his behalf, their application could not be changed. The presiding judge refused to give such instructions, and, having stated that the receipt of a note upon a debt was *prima facie* to be deemed a payment, he left it for the jury to say whether the ordinary presumption in the case of a payment by one who ought to pay was overcome by the facts in this case. *Held*, that the rulings of the judge were sufficiently favorable to the defendant. *Vickery* v. *Ritchie*, 318.

Certain acts of mortgagee of real estate which were held not to indicate that agent was authorized to receive payment of principal of mortgage note nor to estop mortgagee from denying that agent had such authority, see AGENCY, 4, 5.

Statement of rule of law, as to rights of holder, which applies when officer of corporation uses, to pay individual debt, corporation check payable to creditor, and of different rule which applies when officer uses for such

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purpose corporation check payable to himself and indorsed to creditor, and application of first rule to facts of certain case where both officer and corporation were debtors of payee when check was given and, although payee applied check to officer's individual account, corporation contended it should have been used to pay its account, see CORPORATION, 3–5.

PLEADING, CIVIL.

Declaration.

1. Where in an action of tort the defendant did not demur nor ask for specifications in regard to the allegations in the declaration, he cannot raise objections to irregularities of form in the declaration for the first time at the close of the evidence at the trial. *Wright* v. *Chelsea*, 460.

2. Under R. L. c. 173, § 6, cl. 4, the declaration in an action of contract can include allegations of any number of breaches in one count, and the plaintiff is not confined to one form of statement in regard to any particular breach alleged. *Saco Brick Co.* v. *J. P. Eustis Manuf. Co.* 312.

3. Under R. L. c. 173, § 6, cl. 2, requiring that a declaration in a personal action "shall state concisely and with substantial certainty the substantive facts necessary to constitute the cause of action," the declaration upon a contract in writing need not set out all the details contained in the contract. *Ibid.*

4. A declaration alleged that the plaintiff and the defendant entered into a contract in writing, of which a copy was annexed, whereby the defendant agreed to sell to the plaintiff a gas engine and the plaintiff agreed to pay therefor $1,750, that the defendant delivered a certain engine to the plaintiff and that the plaintiff paid the defendant therefor $1,750, but that the defendant "failed to comply with the contract in the following particulars." Here followed allegations as to the breaches complained of, and the declaration concluded with averments in regard to the damages sustained by the plaintiff. On demurrer, it was *held*, that this declaration set forth a cause of action clearly and properly stated. *Ibid.*

Demurrer.

5. In considering a demurrer to the declaration in an action of contract, it was *said*, that, if, according to the true construction of the contract, breaches were assigned improperly, the defective allegations could be demurred to specifically without demurring to the declaration as a whole; but in the present case no such ground of demurrer was alleged. *Saco Brick Co.* v. *J. P. Eustis Manuf. Co.* 312.

Replication.

Failure of plaintiff to set up, by way of replication in action at law, equitable defense that certain defense set up in answer had become *res judicata* against the defendant by reason of decree in suit in equity in which defendant sought to enjoin plaintiff from prosecuting action at law, was held, because of lack of objection on part of defendant, not to preclude plaintiff from making such contention at trial of action at law, see RES JUDICATA, 2.

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PLEADING, CRIMINAL.

Indictment or Complaint.

1. A complaint under R. L. c. 212, § 61, alleged that the defendant on a day named at a certain city, "and on divers other days and times at said [city], was then and there a person known to be a pickpocket and thief and then and there having no visible and lawful means of support and was then and there on said days and times aforesaid at [the city] aforesaid, found prowling around a certain railroad depot in said [city], whereby and by force of the statute in such case made and provided, the said [defendant] was and still is a vagabond." *Held*, that the complaint was not bad for duplicity; that the charge was of a continuing offense, and that the time properly might have been alleged as within a certain period beginning on a day named and ending on a later day named, but that the complaint sufficiently alleged an offense on the day named, and that the words "and on divers other days and times at said [city]" and the later words "on said days and times aforesaid" and also the words "and still is" might be stricken out as surplusage. *Held, also*, that the complaint in following the language of the statute was sufficiently certain, it being plain that the charge of being a vagabond was made under R. L. c. 212, § 61, and was not made under the provisions of § 46 of the same chapter. *Commonwealth* v. *Ellis*, 572.

So much of R. L. c. 218 as prescribes form for indictment for murder was held to be constitutional, see HOMICIDE, 4.

Objection that indictment for murder by assaulting and beating is defective because it is uncertain whether assault and murder were committed as to same person, word "said" having been omitted as to charge of murder, must be raised by motion to quash indictment, see HOMICIDE, 1.

Bill of Particulars.

2. A motion by the defendant in a criminal case for a bill of particulars, which merely states that the defendant "demands that a bill of particulars be furnished him in accordance with his rights under the Revised Laws," properly may be denied, because it does not point out any part of the indictment or complaint about the meaning of which the defendant is uncertain and needs information to enable him to prepare his defense. *Commonwealth* v. *Ellis*, 572.

Motion of defendant under indictment for murder which was held not to be motion for bill of particulars but for disclosure of evidence of Commonwealth which defendant had no right to have, see HOMICIDE, 2, 3.

In prosecution for larceny, bill of particulars, which sets forth facts relied on by Commonwealth without any color being added by way of conclusion of law, was held to have left Commonwealth free to show that larceny was committed, whether larceny at common law, larceny by embezzlement, larceny by obtaining property by false pretenses, or larceny under definition contained in R. L. c. 208, § 26, see LARCENY, 5.

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Motion to quash.

Objection that indictment for murder by assaulting and beating is defective because it is uncertain whether assault and murder were committed as to same person, word "said" having been omitted as to charge of murder, must be raised by motion to quash indictment, see HOMICIDE, 1.

PLEDGE.

1. An agreement, contained in a note secured by a pledge of negotiable securities, in regard to the power of the pledgee to dispose of the securities before default, is not to be construed to give the pledgee the right to sell the securities and thus to end the pledge and all the rights of the pledgor in the securities, unless the language to this effect is unequivocal. *Commonwealth* v. *Althause*, 32.
2. A note secured by a pledge of negotiable securities contained the following provision: "It is hereby agreed that the lenders or assigns shall have the right to make such use of the collateral security named herein . . . as they may desire, subject only to their obligation to deliver to the said borrower, or order, collateral of the same amount and kind." *Held*, that the power to make use of the pledged securities was confined to their use as collateral security and gave the pledgee no right to sell them before default. Distinguishing Ogden *v.* Lathrop, 65 N. Y. 158. *Ibid.*

Evidence which was held to be relevant and material, at trial of indictment for larceny of negotiable securities given to defendant by way of pledge, to prove intent to commit crime charged, see LARCENY, 6.

POLICE, DISTRICT AND MUNICIPAL COURTS.

Failure of defendant to enter in Superior Court appeal from police, district or municipal court, and failure of plaintiff to petition within one year for affirmation of judgment of lower court, operate to discontinue action, see PRACTICE, CIVIL, 10.

POWER.

Succession tax imposed by St. 1909, c. 527, § 8, upon property, received by heirs of settlor under trust deed made in 1844 by reason of failure of beneficiary for life, who died after passage of statute, to exercise power of testamentary appointment given by deed of trust, see TAX, 5, 6.

PRACTICE, CIVIL.

Premature Action.

Action of deceit for fraud practised by false representations in sale of mining claim, involving questions, whether plaintiff had suffered any damage or whether action was brought prematurely, see DECEIT, 1.

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Parties.

1. Under the provisions of St. 1894, c. 225, now incorporated in St. 1907, c. 576, § 73, a person to whom a policy of life insurance, issued after April 11, 1894, is made payable by its terms may maintain an action upon it in his own name although not a party to the contract of insurance. *Blinn* v. *Dame*, 159.

Amendment of Officer's Return.

Action of judge of Superior Court in allowing motion of deputy sheriff to amend return made by him on execution so that it would read that he levied on interest of debtor in certain real estate at time of certain attachment instead of at time of levy, which was held to have been within judge's power and to have been warranted, see EXECUTION, 2.

Interrogatories.

Certain rulings of trial judge with regard to interrogatories which were held correct, see *post*, 25.

Auditor's Report.

2. No exception lies to the denial of a motion to recommit an auditor's report with an instruction to the auditor to report all the evidence on which he based a certain finding. *Tobin* v. *Kells*, 304.
3. In refusing to entertain an exception to the denial of a motion to recommit an auditor's report, it was *said*, that, although it is a proper exercise of judicial discretion for a trial judge to recommit an auditor's report where it appears that the auditor has made an erroneous ruling which is likely to deprive a party of important rights, yet the mere fact that an auditor has erred upon abstract questions of law, which can be raised afterwards at the trial, does not make it necessary to recommit his report. *Ibid.*
4. In refusing to entertain an exception to the denial of a motion to recommit an auditor's report with an instruction to the auditor to report all the evidence on which he made a certain finding, it was *said*, that, even if this court had had authority to review the exercise of the discretion of the trial judge, the bill of exceptions here presented no means of doing so, as it did not show what facts, if any, were before the judge when he denied the motion. *Ibid.*

Conduct of Trial.

Admission and exclusion of evidence.

5. The exclusion of questions to a witness likely to lead into collateral matters and to divert attention unduly from the material issues on trial is within the discretion of the presiding judge. *Wright* v. *Chelsea*, 460.

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Requests and rulings.

6. In an action against a railroad corporation for the breach of an alleged agreement to pay the reasonable expenses incurred by the plaintiff in the production of a guide book intended to make known the shooting and fishing regions along the line of the defendant's road, the plaintiff relied upon an oral agreement made in behalf of the defendant by two of its agents whose authority to make it was denied by the defendant. The plaintiff filed interrogatories addressed to the defendant, which were answered by its vice-president. The presiding judge made rulings in regard to the answers to the interrogatories, which, when rightly interpreted, were in substance, that the answers were evidence of the facts tending to show the authority or the want of authority of the agents, but were not evidence so far as they stated the opinion or the conclusion of the vice-president from these facts as to the extent of their powers or duties. *Held*, that the rulings of the judge, thus interpreted, were correct, and that the jury were not misled. *Parrot* v. *Mexican Central Railway*, 184.

Ruling given at request of party cannot be complained of by party who asked for it although ruling was wrong and verdict was adverse to him, see *post*, 26.

Request for rulings, in action by guest of driver of automobile against one who collided with automobile, which was held not to raise question whether driver of automobile was operating it without license, see *post*, 18.

Objections by defendant to formal irregularities in declaration cannot for first time be raised at trial, where no demurrer or motion for specifications had been filed, see PLEADING, CIVIL, 1.

Judge's charge

Inadvertent use of "and" for "or" in charge which under circumstances was held not to afford ground for exception, see *post*, 27.

Exception to part of judge's charge, predicated on finding of certain fact by jury, which was not sustained because nature of verdict showed that such fact was not found by jury and excepting party therefore was not harmed, see *post*, 22.

Where rules of law governing liability of defendant have been correctly stated by judge in charge, additional remark not material to decision of case affords no ground for exception, whether it was correct or not, because jury will be presumed to have followed correct instructions which were given them upon issues before them, see *post*, 21.

Ordering Verdict.

Proper ruling of trial judge refusing to order verdict for plaintiff in action of tort for conversion, see CONVERSION, 1.

What is open to defendant at argument of exception by him to refusal of trial judge to order verdict in his favor, which ruling was made by judge without asking defendant's counsel to point out particularly propositions of law upon which he relies, see *post*, 16.

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Verdict.

Amendment of verdict which was held not to have rendered injustice to defendant, see *post*, 7.

Opinion of justices of this court upon constitutionality of certain proposed legislation as to new trials after verdicts have been set aside, see CONSTITUTIONAL LAW, 10, 11.

Exceptions to part of judge's charge, predicated on finding of certain fact by the jury, which were not sustained because nature of verdict showed that such fact was not found by jury and excepting party therefore was not harmed, see *post*, 22.

Whether verdict for defendant, in action of tort for personal injuries by employee against employer, on count under R. L. c. 106, § 71, cl. 1, and verdict for plaintiff on count at common law alleging defective and dangerous machinery as cause of plaintiff's injuries, were inconsistent, was held not to have been raised by certain exceptions taken by defendant, see *post*, 17.

Amendment of Verdict.

7. The declaration in an action of contract against a corporation contained three counts, the first being for alleged arrears of salary, the second for a fixed amount alleged to be due as a commission for bringing about a sale of shares of capital stock of the defendant, and the third, alleged to be for the same cause of action as the second, being on a *quantum meruit* for bringing about the sale of the capital stock. At the trial there was evidence for the jury on the first and the third counts, but none on the second. The defendant asked for a ruling as to each count that on all the evidence the jury should find for the defendant. The rulings were refused. The jury found a general verdict for the plaintiff for an amount equal to the amount claimed in the first count with interest from the date of the writ, which was less than the amount claimed in the second count, and the defendant alleged exceptions. While the defendant's exceptions were pending, but before they were entered in this court, the plaintiff filed a motion, alleging that "the evidence at the trial would have warranted" the verdict which was rendered "on the first count, and upon no other," and asking that the verdict be entered on the first count and that on the second and third counts judgment be entered for the defendant. The motion was allowed, subject to an exception by the defendant. *Held*, that the exception must be overruled because the defendant was not harmed by the granting of the motion and justice did not require a new trial. *Fallon* v. *Clifton Manuf. Co.* 491.

New Trial.

Opinion of justices of this court upon constitutionality of certain proposed legislation as to new trials after verdicts have been set aside, see CONSTITUTIONAL LAW, 10, 11.

On exceptions to this court from rulings of judge of Superior Court refusing to submit to jury several issues framed on appeal from Land Court and

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ordering answers adverse to excepting party, new trial was ordered only on some of the issues, see *post*, 8.

New Trial of Issues from Land Court.

8. On appeal to the Superior Court from a judgment of the Land Court in a writ of entry, the determination of which depended upon whether or not a deed, which purported to be executed on behalf of a corporation by one of its officers in completion of a sale previously made by the officer on behalf of the corporation, was authorized and delivered by it, three issues were framed and submitted to the jury, the first being, whether the deed was authorized by the corporation, the second, whether it was delivered to the purchaser, and the third, whether its execution and delivery were ratified by the corporation. The presiding judge directed that all the issues be answered in the negative. The tenant alleged exceptions. This court held that there was evidence which would have warranted affirmative answers to the first and and second issues, but that, because the execution and delivery of the deed by the corporation would have been in direct contravention of the act which was relied on as an act of the corporation in ratification of the deed, further held that the verdict on the third issue was ordered properly, and *therefore directed* that there should be a new trial on the first and second issues, and that the verdict on the third issue should stand. *Bishop* v. *Burke*, 133.

Rulings at Former Trial.

9. Where at the first trial of a case in the Superior Court the presiding judge discharges the jury and orders that the case be continued, and, after interrogatories have been filed by the plaintiff and have been answered in behalf of the defendant, the case is tried again before another judge, the presiding judge at such second trial is not bound by any intimations or expressions of opinion of the judge at the first trial. *Parrot* v. *Mexican Central Railway*, 184.

Appeal.

10. The defendant in an action brought in a municipal court appealed to the Superior Court from a judgment for the plaintiff, and then failed to enter his appeal in the Superior Court. The plaintiff failed for more than a year to file under R. L. c. 157, §§ 22, 23, a complaint for an affirmation of the judgment of the municipal court. *Held*, that the right of the plaintiff to discontinue his action was the same after the appeal as before, and that his failure seasonably to make a complaint for an affirmation of the judgment was such a discontinuance. *Schenck* v. *Boston Elevated Railway*, 437.

Exceptions.

Disallowance of bill.

11. The judge of a trial court is right in refusing to allow a bill of exceptions which contains an erroneous statement, probably unintentional, that a certain exception was taken that was not taken, which contains a long

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report of evidence wholly unnecessary to a proper presentation of the legal questions raised and therefore irrelevant and objectionable, and which presents a picture of the case changed in color by the strong feeling of the excepting counsel in favor of his client. *Horan, petitioner*, 256.

Establishment of exceptions by proceedings before full court.

12. The proof of a bill of exceptions before this court through the appointment of a commissioner is a remedy that sometimes may be necessary, but it is intended only for cases in which the excepting party, intelligently and in good faith but unsuccessfully, has attempted to obtain the allowance of a bill of exceptions which in general is a correct statement of the material questions raised by his exceptions made with due regard to the rights of the opposing party. *Horan, petitioner*, 256.

Impropriety of irrelevant matter in bill.

13. The insertion in a bill of exceptions, alleged to have been taken at the trial of a libel for divorce, of a statement of testimony, which is irrelevant to the questions of law raised in the case, for the purpose of affecting the sympathies or feelings of the justices of this court and inclining them to a revision of the findings of fact made at the trial, is not legitimate. *Horan, petitioner*, 256.

Construction of bill.

14. A statement in a bill of exceptions that certain facts "appeared from the evidence" means that these facts are undisputed or admitted. *Neal* v. *Scherber*, 323.

What questions are raised by exceptions.

15. In an action against a telegraph company under R. L. c. 122, §§ 9, 10, for wrongfully refusing to transmit a telegram, the defendant at the trial did not ask for any ruling that the statute was unconstitutional as a regulation of interstate commerce and this question seemed not to have been brought to the attention of the judge or to that of the plaintiff's counsel, but the defendant asked the judge to rule that "the defendant cannot be held liable under R. L. c. 122, § 9, for refusal to receive and transmit the message in question under the circumstances under which it was presented." This ruling was refused by the judge and the defendant excepted, and this court, against the plaintiff's contention, treated the question of the constitutionality of the statute as open under this exception. *Vermilye* v. *Western Union Telegraph Co.* 401.

16. Where in an action of contract the presiding judge refuses to rule that the defendant committed no breach of contract and refuses to order a verdict for the defendant, and does not ask the defendant's counsel to point out more particularly the propositions of law upon which he relies, it is open to the defendant upon exceptions to raise in this court a question of law actually involved in the refusal of the requests which was not referred to or thought of by the judge or the counsel at the trial. *Parrot* v. *Mexican Central Railway*, 184.

17. In an action by a workman against his employer for personal injuries caused by a heavy casting falling upon the plaintiff owing to the breaking

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of a hook attached to a chain by means of which it was being hoisted, where a count under R. L. c. 106, § 71, cl. 1, alleged a defect in the ways, works or machinery of the defendant and a count at common law alleged that the defendant furnished the plaintiff with dangerous and defective machinery, the defendant excepted to refusals of the presiding judge to rule that the plaintiff could not recover upon either of these counts. There was evidence for the jury of a defect in the hook and of negligence of the defendant in not ascertaining the defect. The jury found for the defendant on the count under the statute and found for the plaintiff on the count at common law. *Held*, that the question, whether there was any inconsistency between the verdict for the defendant on the count under the statute and that for the plaintiff on the count at common law, was not before this court, and that, as the question of the soundness of the hook was left properly to the jury, the defendant's exceptions must be overruled. *Sullivan* v. *Reed Foundry Co.* 280.

18. In an action by an administrator against the driver of an automobile for the conscious suffering of the plaintiff's intestate who received fatal injuries by reason of a collision with another automobile in which the plaintiff's intestate was being driven as a guest of its driver, there was evidence that the driver of the automobile in which the plaintiff's intestate was had not secured the license to drive an automobile required by St. 1903, c. 473, §§ 4, 5. At the close of the evidence the defendant asked for the following ruling: "If the jury find that the driver was negligent in driving the automobile in which [the plaintiff's intestate] was riding, and such negligence was a contributory cause of the accident, then the plaintiff is bound by such negligence and cannot recover." The trial judge gave to the jury instructions on the subject of imputed negligence which this court held were ample and sufficient, and refused to give the ruling requested. The defendant alleged exceptions, and in this court relied only upon an exception to the refusal to give the ruling above quoted. *Held*, that by the exception to the refusal to give the quoted ruling, the question, whether the fact, that the driver of the automobile in which the plaintiff's intestate was being driven did not have the required license to operate an automobile, affected the right of the plaintiff to recover, was not brought before this court. *Littlefield* v. *Gilman*, 539.

Insufficient bill.

19. No exception lies to the exclusion of a question to a witness where no statement was made of the answer expected. *Wright* v. *Chelsea*, 460.

20. An exception to the refusal of a presiding judge to rule, that the plaintiff in an action of tort for an alleged conversion is entitled to recover the amount claimed in his declaration, cannot be sustained where the bill of exceptions does not purport to state all the material evidence. *Cohen* v. *Longarini*, 556.

Presumption as to conduct of jury leading to overruling of exception.

21. Where in an action of contract, in which the jury returned a verdict for the plaintiff, the rules of law governing the liability of the defendant were

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correctly laid down by the presiding judge, an additional remark of the judge not material to the decision of the case affords the defendant no ground for exception, whether it was correct or not, because the jury will be presumed to have followed the correct instructions given to them upon the issues before them, especially where they were warned by the judge that the subject of the remark was something about which they should not concern themselves. *Woods* v. *Lowe*, 1.

Non-prejudicial error.

22. Where a verdict for a plaintiff shows by the amount of the damages given that the jury did not find a certain fact, an exception of the defendant to an instruction to the jury, that if they found such fact to exist they might return a verdict for the plaintiff, cannot be sustained, as, even if the instruction was erroneous, the defendant was not harmed by it. *Woods* v. *Lowe*, 1.

23. Where the trial of an action of tort against a city is conducted upon an interpretation of the statutes affecting the liability of the defendant which is more favorable to the defendant than the true interpretation, the defendant cannot take advantage of an error in any ruling or instruction which is erroneous by reason of the mistake in its favor. *Wright* v. *Chelsea*, 460.

24. Where the declaration in an action of contract contains two counts alleged to be for the same cause of action, one upon a special agreement for a certain fixed amount, and the other upon a *quantum meruit*, an exception by the defendant to a refusal by the presiding judge to rule that on all the evidence the jury should find for the defendant on the special count will not be sustained, even although there were no evidence to support a verdict for the plaintiff on that count, if the jury return a general verdict in an amount less than the fixed sum claimed in that count, since it is apparent that the jury did not find for the plaintiff on the special count and that the defendant was not harmed by the refusal to rule. *Fallon* v. *Clifton Manuf. Co.* 491.

25. The ruling of a presiding judge excluding a portion of an answer to an interrogatory affords no ground for exception, if there was nothing material in the portion excluded that was not stated fully in the part of the answer which was admitted in evidence. *Parrot* v. *Mexican Central Railway*, 184.

26. If a presiding judge makes a ruling at the request of the defendant in an action and the jury return a verdict for the plaintiff, the defendant cannot complain of the ruling made at his request; nor can he complain of other rulings, which, although not made at his request, were too favorable to him upon the theory of the ruling which he requested. *Reagan* v. *Union Mutual Life Ins. Co.* 79.

27. The inadvertent use of the word "and" instead of the word "or" between two propositions by a presiding judge in his charge to the jury, affords no ground for exception, if the judge's repeated use of the word "or" in the same connection in other parts of his charge must have made

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it plain to the jury that only one of the two propositions need be established for the purpose in question. *Reagan* v. *Union Mutual Life Ins. Co.* 79.

28. In an action on a policy of life insurance, where the defendant relies on the defense that the policy was obtained by fraud on the part of the insured, if the contract of insurance is governed by the law of another State, and no evidence in regard to the law of that State is introduced at the trial, although the common law of the other State will be assumed to be the same as that of Massachusetts, the provision of R. L. c. 118, § 21, that a misrepresentation made by the insured will not avoid the policy unless it was made with actual intent to deceive or increased the risk of loss, has no application, and the provision of § 73 of the same chapter, that a part of an application of the insured referred to in the policy of which no copy is attached to the policy shall not be received in evidence, also is inapplicable; whereas, if the contract contained in the policy is governed by the law of this Commonwealth, both of those provisions apply. In such an action the presiding judge instructed the jury that the contract of insurance was made in another State, and, although this instruction probably was erroneous, no exception was taken to it and both parties appeared to acquiesce in it. After a verdict for the plaintiff the defendant alleged exceptions, by which it appeared that, whichever law governed the contract, the rulings of the judge were too favorable to the defendant, so that whatever errors the instructions of the judge might have contained in regard to the provisions of the statutes mentioned above, the defendant could not have been prejudiced by them. *Ibid.*

Admission of testimony of expert on matters of common knowledge which was held to have done excepting party no harm where answers were right, see EVIDENCE, 13.

Erroneous finding and ruling of judge sitting without jury, exceptions to which were not sustained because they were upon issue not raised by pleadings and therefore excepting party was not harmed by them, see CORPORATION, 4.

Other exceptions which were not sustained although error was committed by trial judge, because error was not prejudicial, see WAREHOUSEMAN, 1.

To refusal to recommit auditor's report.

No exception lies to denial of motion to recommit auditor's report with instruction to report all evidence on which he based certain finding, see *ante*, 2.

Frivolous bill.

29. This case previously was before this court on two occasions upon exceptions by the plaintiff to the ordering of verdicts for the defendants, and the exceptions each time were sustained. Upon exceptions by the defendants after a verdict for the plaintiff, no new question was raised, the exceptions were adjudged frivolous and double costs from the time of the allowance of the defendants' exceptions were allowed. *Boyd* v. *Taylor*, 335.

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Discontinuance.

Failure of defendant to enter in Superior Court appeal from police, district or municipal court, and failure of plaintiff to petition within one year for affirmation of judgment of lower court, operate to discontinue action, see *ante*, 10.

Double Costs.

Double costs awarded where exceptions were adjudged frivolous, see *ante*, 29.

PRACTICE, CRIMINAL.

Constitutional Rights of Defendant.

Argument of district attorney at trial of indictment for murder, where defendant elected not to testify, which was held not to infringe on right of defendant or to comment improperly on such failure to testify, see HOMICIDE, 19.

Jury and Jurors.

At hearing of motion for new trial of indictment for murder where defendant contends that one of traverse jurors was insane at time of trial, burden is on defendant to prove his contention by fair preponderance of evidence, see HOMICIDE, 20.

Whether under certain circumstances defendant under indictment for murder would be harmed by being refused right to challenge for cause person improperly summoned to act as juror, if in course of trial he did not exhaust peremptory challenges to which he was entitled, see HOMICIDE, 17.

Certain informalities in selecting of members of grand and traverse juries were held not to deprive Superior Court of jurisdiction of indictment for murder returned by grand jury or to invalidate trial before traverse jury containing such member, see JURY AND JURORS, 1, 2, 4.

Nor did mere fact that one of such jurors removed from county after he was chosen as juror but before he served as such deprive court of jurisdiction, see JURY AND JURORS, 3.

Motion for Disclosure of Evidence of Commonwealth.

Motion of defendant under indictment for murder which was held not to be motion for bill of particulars but for disclosure of evidence of Commonwealth, which defendant had no right to have granted, see HOMICIDE, 2, 3.

Election.

1. At the trial of a complaint under R. L. c. 100, § 62, charging the defendant in a single count with making an unlawful sale of intoxicating liquor to a minor, if the evidence of the Commonwealth tends to prove two distinct sales on different days, the defendant has the right before opening his defense to require the Commonwealth to elect upon which of the sales it intends to rely for a conviction. *Commonwealth* v. *Coyne*, 21.
2. At the trial of a complaint under R. L. c. 100, § 62, charging the defendant in a single count with making an unlawful sale of intoxicating liquor

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to a minor, if the evidence of the Commonwealth tends to prove two distinct sales on different days, and the defendant before opening his case moves that the Commonwealth be required to elect upon which of the sales it intends to rely for a conviction, and the presiding judge erroneously denies the motion, the defendant by omitting to take an exception to the denial of his motion and proceeding to put in his evidence does not waive the right to renew his motion at the close of all the evidence and before the beginning of the arguments, and his exception to a denial of his motion by the judge at that time will be sustained. *Commonwealth* v. *Coyne*, 21.

3. At the trial of a complaint under R. L. c. 100, § 62, charging the defendant in a single count with making an unlawful sale of intoxicating liquor to a minor, if the evidence of the Commonwealth tends to prove two distinct sales on different days, an error of the presiding judge, in denying a motion of the defendant that the Commonwealth be required to elect upon which of the sales it intends to rely for a conviction, is not cured, after the counsel for the defendant has been obliged to argue that there was no sale on either of the two days, by a voluntary concession of the district attorney in his closing argument that he will ask for a conviction only upon proving a sale on a certain one of the two days and by an instruction to the jury that by reason of this concession the jury can convict the defendant only of the single offense relied upon, because the defendant already has suffered the disadvantage of his counsel being obliged to argue that there was no sale on either of the two days. *Ibid.*

Waiver.

Defendant in criminal complaint which charged a single offense, who did not except to refusal of judge presiding at trial to compel Commonwealth to elect at close of its case as between two offenses of same nature which Commonwealth's evidence tended to prove, did not thereby waive his right to renew his motion at close of all evidence, see *ante*, 2, 3.

Conduct of Trial.

Order of evidence.

4. The order of evidence is a matter wholly within the discretion of the presiding judge at a criminal trial as well as at a civil one, and no exception lies to the admission of any material evidence on the ground that it is offered for the first time upon the re-direct examination of a witness. *Commonwealth* v. *Stuart*, 563.

Admission and exclusion of evidence.

Rulings of judge, presiding at trial of complaint for illegal sale of intoxicating liquor, in admission of evidence as to reputation of defendant, offered by Commonwealth to rebut evidence introduced by defendant, which were held correct, see EVIDENCE, 16.

Argument for Commonwealth.

Proper rulings of judges presiding at trial of indictment for murder as to certain arguments of district attorney, see HOMICIDE, 18, 19.

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Judge's charge.

5. At the trial of a complaint for keeping and maintaining a tenement used for the illegal sale and the illegal keeping of intoxicating liquors, the instructions of the presiding judge to the jury in regard to the burden of proof were very meagre, and the defendant asked the judge to give to the jury the additional instructions, "that they must give the benefit of any reasonable doubt to the defendant, that a greater degree of certainty was required to convict the defendant of a criminal charge than might satisfy the jury in their ordinary business affairs and that if evidence could be explained reasonably upon any other hypothesis than that of the defendant's guilt the jury should find the defendant not guilty." *Held*, that the additional instructions asked for by the defendant embodied correct statements of the law and should have been given. *Commonwealth* v. *Maddocks*, 152.

6. At the trial of a complaint for keeping and maintaining a tenement for the illegal sale and the illegal keeping of intoxicating liquors, the counsel for the defendant put in evidence, without objection, the facts that the defendant had lived in the community for thirty years with no complaint ever having been made against him, and that he had a wife and three children. The counsel for the defendant, in his argument to the jury, said, "that he desired to impress upon the jury their responsibility and ask them to take into consideration the fact that this defendant had been in the community for many years with no stain upon his character, that he had a family that would be deeply affected by the outcome of this trial, that the defendant was not saying this by way of begging for mercy but simply to impress upon them the seriousness of the charge, of the probable effect upon the defendant and his family, so that they should realize their responsibility and weigh with the most extreme care the evidence as submitted against the defendant to see whether or not it bore the impress of truth and required them to find the defendant guilty beyond any reasonable doubt." The presiding judge in his charge to the jury instructed them "that any remarks made by the defendant's counsel in regard to the wife and family of the defendant were improper, that it made no difference whether he was a man of standing, whether he had a wife or family or not, that the defendant had no right to argue this proposition to the jury, that the remarks were intended by the counsel for the defendant simply to throw dust in the eyes of the jury and divert their minds from the proper issue in the case." *Held*, that the statement of the judge quoted above in regard to the intention of the defendant's counsel was unwarranted and was prejudicial to the defendant, and that an exception to it must be sustained. *Ibid.*

Ordering Verdict.

Certain trial of indictment for murder where evidence was circumstantial and it was held that request for verdict for defendant was properly refused, see HOMICIDE, 5–7.

New Trial.

At hearing of motion for new trial of indictment for murder where defendant contends that one of traverse jurors was insane at time of trial, burden

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is on defendant to prove his contention by fair preponderance of evidence, see HOMICIDE, 20.

Exceptions.

Non-prejudicial error.

7. The defendant in a criminal case cannot complain of an erroneous instruction of the presiding judge, although it resulted in a mistrial, if the defendant did not object to the instruction at the trial. *Commonwealth* v. *Althause*, 32.

8. The defendant in a criminal case has no right of exception to an erroneous instruction of the presiding judge stating a view of the case which the defendant asked the judge to adopt. *Ibid.*

Judge's error not cured by subsequent events.

Exception by defendant in criminal complaint charging single offense to wrongful refusal of presiding judge to compel Commonwealth to elect as between two offenses of same nature which its evidence tended to prove will be sustained although in his closing argument district attorney states that he will ask for conviction only on proving one of offenses, and judge in charge instructs jury that they can convict only of single offense relied on, see *ante*, 1–3.

Presumption as to conduct of jury leading to overruling of exception.

9. In a criminal case, as in a civil one, unless there is something to show the contrary, it must be assumed that the jury understood and acted upon the instructions given to them by the judge. *Commonwealth* v. *Richmond*, 240.

PRESCRIPTION.

Where, in petition under mill act, respondent claimed he had right by prescription to do act complained of, he may show, on question whether acts of adverse user were committed by his predecessor in title, that such predecessor had motive for doing so, see EVIDENCE, 20.

PROBATE COURT.

Jurisdiction.

1. By the provisions of a will a certain fund was given to a trustee, the income to be paid to an adopted daughter of the testator for her life, and the principal after the beneficiary's death to be distributed among certain societies and corporations. After the death of the beneficiary, the trustee died without having distributed the fund, and thereupon without notice to the societies and corporations interested, but with notice only to the Attorney General of the Commonwealth and to a town which in a contingency that did not occur might have been interested, the Probate Court appointed a trustee to take over the fund from the executor of the will of the deceased trustee. One of the corporations entitled to the fund petitioned that the decree of appointment be vacated, and the executor of the deceased trustee filed a bill in equity for instructions as to the distribution of the fund. *Held*, that the decree of appointment, having been made

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without the notice to all persons interested required by R. L. c. 147, § 5, was made without authority and should be vacated, and *also*, that, because an order would go from this court to the Probate Court vacating the decree appointing the trustee at the same time with the order upon the bill for instructions, a decision could be made upon the bill for instructions in the same way as if there had been no attempted appointment of a new trustee, and that the executor of the deceased trustee, without a new trustee being appointed by the Probate Court, might distribute the trust fund in accordance with instructions given him. *Clarke* v. *Andover*, 91.

Appointment of new trustee, after decree appointing former trustee was declared invalid, was held to be unnecessary, see TRUST, 3.

Decree.

2. Under St. 1891, c. 415, § 4, now incorporated in substance in R. L. c. 162, § 2, providing that "the probate courts shall be courts of superior and general jurisdiction with reference to all cases and matters in which they have jurisdiction," an erroneous decree of a probate court made in such a case stands until it is vacated or changed by that court. *Clarke* v. *Andover*, 91.

PROXIMATE CAUSE.

See NEGLIGENCE, 46.

PUBLIC OFFICERS.

If municipal council of city in conducting affairs of public act with ill-will toward individual, this does not give him cause of action in tort against members of council, see MUNICIPAL CORPORATIONS, 1.

For other cases regarding public officers, see MUNICIPAL CORPORATIONS, 2–6.

RAILROAD.

Officers or Agents.

Case involving question whether certain officers of railroad company had authority to make certain contract for advertising purposes, see AGENCY, 3.

And whether such contract was made, see CONTRACT, 4.

Maintenance of Fences.

1. Review by BRALEY, J., of the statutes and of the decisions of this court with regard to the duty of railroad corporations to maintain fences upon both sides of the entire length of their railroads. *Menut* v. *Boston & Maine Railroad*, 12.

2. Section 120 of R. L. c. 111, now St. 1906, c. 463, Part II. § 103, which requires every railroad corporation to "erect and maintain suitable fences, with convenient bars, gates or openings therein, upon both sides of the entire length of its railroad," with certain exceptions, imposes no duty upon railroad corporations to prevent, by the maintenance of such fences,

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the owners of premises adjoining the railroads, or persons rightfully upon such premises, from falling down embankments along the railroads. *Menut* v. *Boston & Maine Railroad*, 12.

3. The history of St. 1906, c. 463, Part II. § 103, which provides that "every railroad corporation shall erect and maintain suitable fences, with convenient bars, gates or openings therein, upon both sides of the entire length of its railroad," with certain exceptions, requires that the words "suitable fences," therein shall be construed to mean fences suitable to protect the cattle of adjoining landowners and to prevent their intrusion upon the railroad locations; and, if the agricultural conditions which prevailed when the development of the railroad law of the Commonwealth began and for sometime afterwards very largely have changed and the statutory regulations relating to the operation of railroads should be made more rigorous, as to places where the population has become increasingly urban and more dense, by the imposing of additional safeguards through the erection of barriers or the prescribing of what shall constitute a lawful fence for the personal safety of those who may live on estates adjoining or in proximity to the railroad location or may use the public ways contiguous and parallel to it, such change should come, not from an alteration in the judicial construction of the statute, but only from further legislation. *Ibid.*

Liability for Negligence.

Action against railroad company by persons alleged to have been injured because of negligence of company's servants or agents, see NEGLIGENCE, 37, 38.

RECEIVER.

Of Savings Bank.

Right of depositor under certain circumstances to maintain action against savings bank preliminary to enforcing stockholders' liability, although receivership proceedings are pending, see SAVINGS BANK, 1.

Ancillary.

1. In an ancillary receivership in the courts of this Commonwealth, preference will not be given to domestic creditors unless it appears that there is danger of discrimination against them in the forum of the principal receivership, and then only so far as is necessary to counteract such discrimination. *Thornley* v. *J. C. Walsh Co.* 62.
2. In receivership proceedings against a foreign corporation in courts of this Commonwealth, ancillary to similar proceedings against the corporation in the State of its incorporation, it is proper for the court, in order to secure equality of distribution among all creditors, where Massachusetts creditors have been allowed to prove their claims before the original receiver, to allow foreign creditors to prove their claims here. *Ibid.*
3. Certain creditors of a foreign corporation, which had been engaged in the construction of buildings under contracts with the owners, had valid and

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enforceable mechanics' liens upon certain land and a building constructed thereon by the corporation in the State of its incorporation for the payment of claims which under the contract of the owner with the corporation had to be paid before anything became due from the owner, so that a receiver of the corporation, appointed in proceedings in the State of its incorporation, in order to obtain from the owner the balance due upon the contract, was compelled to allow payments to such creditors in full. Ancillary receivership proceedings were instituted in this Commonwealth, in which a Massachusetts creditor proved an unsecured claim before the receiver. *Held*, that such Massachusetts creditor had no right to payment of his claim in full from the assets in possession of the Massachusetts receiver, but could insist only upon being allowed to share on equal terms with other unsecured creditors of the corporation, wherever they resided. *Thornley* v. *C. J. Walsh Co.* 62.

4. Where a Massachusetts creditor of a foreign corporation, who has proved his claim in receivership proceedings in this Commonwealth ancillary to proceedings against the corporation in the State of its incorporation, has been given an opportunity also to prove his claim in the proceedings in the other State, and has refused to do so, he cannot object to a distribution of the assets in the hands of the Massachusetts receiver among creditors who have proved in both proceedings, irrespective of their places of residence. *Ibid.*

RECEIVING STOLEN PROPERTY.

1. In order to warrant a conviction under R. L. c. 208, § 51, of the crime of receiving stolen property knowing it to have been stolen, it is not necessary to show that the defendant had physical possession of the articles stolen. It is enough to show that the goods were constructively in the defendant's keeping and that he had such control of them as was equivalent to possession. Thus it is sufficient to show that the defendant, knowing that certain cloth had been stolen and was in the possession of his brother in law in the house in which the defendant lived, sought out a purchaser and brought about a sale of the stolen cloth for which he was paid a commission by both the buyer and the seller. *Commonwealth* v. *Kuperstein*, 25.

REFERENCE AND REFEREE.

Whether provisions of certain contract, as to either party being permitted to terminate it if, among other things, he procured from designated referees certain signed statement bearing on merit of reasons for termination, required formal hearing by referees, see CONTRACT, 8.

RELEASE.

Suit in equity to avoid release on ground of mistake, see EQUITY JURISDICTION, 10–13.

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RELIGIOUS SOCIETY.

1. A church building in a village in a town was paid for out of funds obtained from the sale of pews, and belonged to the pew holders. It was controlled by the society consisting only of pew owners or persons who rented pews, and none others had the right to vote at meetings of the society. An article of the constitution of the society was as follows: "In all meetings of the society (or pew holders) a notice shall be posted up in the meeting house two weeks before said meeting." A new religious society was organized in an adjoining village in another town by most of the persons who attended church in the church building mentioned above. A meeting of the society controlling the church building was attempted to be called for the purpose of removing the church building to the adjoining village, but the two weeks' notice of the meeting required by the constitution was not given. At an adjournment of this meeting a vote was passed to remove the church building to the neighboring village. Certain pew holders, who were not present at the meeting or at the adjournment thereof, protested against the attempted action, and brought a suit in equity to restrain the removal of the church building. *Held*, that, even if a vote properly passed at a meeting regularly called to remove the church building to an adjoining village in another town would have been valid against the objection of a minority of the pew holders, which was not decided, such minority could not be bound by the vote passed at a meeting not properly called at which they were not present, and that the plaintiffs were entitled to the injunction prayed for. *Small* v. *Cahoon*, 359.

REPLEVIN.

1. Under R. L. c. 190, § 8, replevin will not lie to recover goods exceeding $20 in value, which were under attachment on trustee process in the hands of the defendant in replevin as trustee when they were taken from him on the replevin writ, although the property thus taken on the replevin writ consisted of necessary household goods less than $300 in value, which are exempt from attachment under R. L. c. 177, § 34, cl. 2, the remedy of the plaintiff, if any, being in tort against the officer who served the trustee process and the attaching creditor. *Cushman* v. *Boston Storage Warehouse Co.* 407.

RES IPSA LOQUITUR.

See NEGLIGENCE, 43, 48.

RES JUDICATA.

1. The decision made in the suit in equity J. P. Eustis Manuf. Co. *v.* Saco Brick Co. 198 Mass. 212; 201 Mass. 391, that the contract on which that suit was founded was made by the Saco Brick Company with the J. P. Eustis Manufacturing Company and not with the Bruce-Merriam-Abbott

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Company, here was affirmed and was held to be conclusive between the parties. *Saco Brick Co.* v. *J. P. Eustis Manuf. Co.* 312.

2. In a suit in equity by a manufacturing company against a brick company, the plaintiff sought to enjoin the defendant from proceeding with an action at law for the breach of a contract in writing for the sale by the manufacturing company to the brick company of a gasoline engine, the manufacturing company alleging that it signed the contract in its own name by mistake and that it signed only as the agent of a third corporation. A decree was made dismissing the bill on the ground that the contract sought to be reformed was made and was intended to be made between the manufacturing company and the brick company and not between the third corporation and the brick company. In the action at law by the brick company against the manufacturing company, thus unsuccessfully sought to be enjoined, the manufacturing company as defendant set up the equitable defense that the contract with the plaintiff was made not by it but by the third corporation for which the defendant was acting as agent. The plaintiff filed no replication to the alleged equitable defense, but the presiding judge ruled that the decree in the suit in equity was a bar to the alleged equitable defense, and no objection was made by the defendant that the plaintiff had not filed a replication of *res judicata*. *Held*, that, while the plaintiff might have pleaded the decree in the suit in equity in a replication of *res judicata*, yet, as no objection had been taken to its failure to do so, this court would regard the question as properly before them, and that the ruling of the judge was right, the fact, that the action at law in which the equitable defense was attempted to be set up was begun before the suit in which the decree was made, being no reason why the decree, which settled the question of fact conclusively between the parties, should not operate as a bar. *Ibid.*

RESTAURANT.

Certain proposed legislation with regard to women under twenty-one years of age being admitted to or served with food or drink in hotel or restaurant conducted by Chinese, which, it was held, would be unconstitutional, see CONSTITUTIONAL LAW, 1, 8.

RESTRAINT ON ALIENATION.

1. A testatrix by her will first gave to her nephew E. $3,000 and to her nephew H. $2,000, and then provided as follows: "Second: I give to my son F. $2,000. Also I give to my executor all the rest, residue and remainder of my estate to pay over the entire income thereof to my son F. during his life. Third: After the death of my son I give to" [four charitable corporations $500 each]; "to [my nephew] E. $3,000; and to [my nephew] H. $2,000. Should there be anything then remaining, I direct that it be divided equally among the six legatees mentioned in this clause. Fourth: I direct that all gifts, whether of principal or income made in this will, should not be alienable by the legatee, nor subject to interfer-

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ence by creditors, until paid to the legatee." During the lifetime of the son of the testatrix, the nephew E. executed an assignment in writing under seal of all his right and interest as legatee under the will. After the death of the son, the administrator with the will annexed of the estate of the testatrix brought a bill for instructions, as to whether he should pay the legacy of this nephew to the nephew himself or to his assignee under the assignment named above. *Held*, that the interest of the nephew under the will was an absolute legal interest, on which the clause of the will attempting to restrain alienation had no effect, and therefore that it passed by the assignment. *Lathrop* v. *Merrill*, 6.

RULES OF COURT.

Divorce Rule 6 of Superior Court is not in conflict with R. L. c. 152, § 18, see MARRIAGE AND DIVORCE, 1.

SALE.

Construction of Contract of Sale.

1. The stipulation in a contract in writing for a sale of goods "Price guaranteed against our own price up to time of shipment" here was shown to mean, as understood by the trade, that the seller would give the buyer the benefit of any drop in the price of the kind of goods sold which the seller gave to other customers although this would make the price less than the price named in the contract. *Twitchell-Champlin Co.* v. *Radovsky*, 72.

By Description.

2. At the trial before a judge without a jury of an action of contract for loss alleged to have been sustained by an unwarranted refusal on the part of the defendant to receive and pay for certain shellac refuse, called "No. 2 keeri lac," which the defendant had agreed to purchase from the plaintiff, the defendant contended that the keeri lac was sold to him by sample, and that that tendered by the plaintiff was not of the quality of the sample. There was evidence tending to show that at the time of the sale neither the plaintiff nor the defendant knew much about the "No. 2 keeri lac," that after an interview between them the plaintiff sent to the defendant a type sample of what he understood "No. 2 keeri lac" looked like, that then the defendant agreed in writing to purchase of the plaintiff a certain quantity of "No. 2 keeri lac (Shellac Refuse)" without further description, and that the plaintiff tendered to the defendant what answered to the general character of "No. 2 keeri lac"; and upon abundant evidence the judge found that there was no sale by sample, but that the "so called sample sent by the plaintiff to the defendant was simply intended to represent the general character of 'No. 2 keeri.'" The finding was for the plaintiff; and the defendant alleged exceptions to the refusal of the judge to rule in accordance with his contention. *Held*, that on the facts as found by the judge the contention of the defendant was without foundation. *Androvette* v. *Parks*, 86.

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3. At the trial of an action for loss alleged to have been caused by an unwarranted refusal on the part of the defendant to receive and pay for certain shellac refuse called "No. 1 keeri lac," it appeared that the defendant agreed in writing with the plaintiff to purchase the merchandise under the description "No. 1 keeri lac" while it still was in India, that on its arrival in New York, in response to a request by the plaintiff that he examine it before shipment, the defendant asked the plaintiff to send him samples. Upon the plaintiff's doing so, the defendant refused the merchandise, asserting that it was not of the right quality. There was no question as to the good faith of the plaintiff in the selection of the samples. There was evidence that the merchandise offered answered the description, "No. 1 keeri lac." The judge found for the plaintiff. *Held*, that the finding was warranted. *Androvette* v. *Parks*, 86.

Of Business.

4. If a person, who has been carrying on the insurance business in his own name and in the name of his father which he had the right to use, sells the business without agreeing not to engage in the same business again and without selling the use of his name or consenting in writing to the use of the name of his father, although he cannot derogate from the effect of the sale by attempting to deprive the purchaser of any part of the business which he has sold to him, he still can engage in the same business himself, using his own name or that of his father, if he does not solicit business from former customers of himself or of his father. *Fairfield* v. *Lowry*, 352.

5. A woman, named Marion Smith Lowry, whose father was named Henry A. Smith and who had the right to carry on an insurance business under the names Henry A. Smith and Henry A. Smith & Co. as well as under her own name, signed an instrument in writing, which also was signed by a man doing business under the name of H. G. Fairfield & Co., as follows: "In consideration of $1,000 cash, (the receipt whereof is hereby acknowledged) and the agreement to pay the sum of $800 additional on December 1st next, we hereby agree to sell and deliver on October 1st next, all our right, title and interest in the insurance business of the late Henry A. Smith, Henry A. Smith & Co. and Marion Smith Lowry, to H. G. Fairfield & Co. Mrs. Lowry to continue in interest until October 1st, and the remaining 10% to be paid within 2 years from date." *Held*, that the language of this instrument was not doubtful, that it did not purport to give to the purchaser of the business the right to use the name of the seller or either of the other names which she had the right to use, and that under the provisions of R. L. c. 72, § 5, the purchaser of the business had no right to use in that business any of those names without the consent in writing of the seller or of the personal representatives of Henry A. Smith. *Ibid.*

If one, who had sold business without making agreement regarding not engaging in same business, upon final payment of purchase price being made after sale, signs and delivers to purchaser receipt containing such

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agreement, agreement is without consideration unless it is made to induce purchaser to refrain from delaying payment, see CONTRACT, 2.

Representations as to Opinion by Seller.

6. Where one has submitted to a prospective purchaser a drawing of a certain applicance which he offered to make for the purchaser and in good faith has made representations to the purchaser as to what in his opinion an appliance made in accordance with the drawing ought to do, and the purchaser, relying on the representations, orders the appliance to be made according to the drawing and purchases it, the seller can recover the purchase price although the appliance fails to do what the seller gave as his opinion that it ought to do. *American Soda Fountain Co.* v. *Spring Water Carbonating Co.* 488.

7. In an action upon items of an account annexed based on an order in writing by the defendant upon the plaintiff for draught arms, to be made according to a "drawing submitted," for the extracting of root beer from kegs, the defendant offered evidence tending to show "that during preliminary negotiations and at the time the order was signed the plaintiff represented to the defendant that it would manufacture special draught arms to be used for the purpose of drawing root beer from wooden kegs, which would deliver automatically two streams of different volume and at different degrees of velocity and which would be durable and practical for the purpose for which they were designed, and submitted to the defendant a drawing or plan of a draught arm, claimed by the plaintiff to be durable and practical for the purpose aforesaid and represented that it would manufacture for the defendant special draught arms in accordance with said plan, which would accomplish the purposes aforesaid; that the defendant, relying upon said representations and believing them to be true, ordered the plaintiff to manufacture for" him the draught arms described in the account annexed, but that the draught arms delivered "were found not to be durable and practical for the use for which they were intended and would not deliver automatically two streams of different volume and at different degrees of velocity." The defendant contended that, while the representations were not "fraudulent in fact" they amounted "in law to fraudulent representations" and were a defense to the action. There was undisputed evidence, which the defendant did not offer to contradict, that the representations made by the plaintiff were not as to his knowledge of what draught arms like those shown in the "drawing submitted" would do, but of what in his opinion they would do. *Held*, that the evidence offered fell short of tending to show that the plaintiff had made any representations which could be shown in defense of the action, such representations as were made being of matters of opinion and not of knowledge. *Ibid.*

Fraudulent.

Sale of mining claim procured by fraud, see DECEIT, 1.

Indictment against several for conspiracy to steal, involving various sales of land, where ordinary rule, that false statements about value of property

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by one offering it for sale are mere dealer's talk, was held to have no application, see CONSPIRACY, 3.
Other rulings at same trial, see CONSPIRACY, 2, 4, 5–11.
Sale which was held not to be fraudulent, see *ante*, 6, 7.

Delivery.

8. If goods are shipped by rail to a buyer under the terms of a contract of sale, the fact that a discount is made from the price equal to the cost of transportation does not prevent the application of the familiar rule that, in the absence of an agreement or usage to the contrary, when goods are to be shipped by rail delivery to the carrier is delivery to the buyer and the title passes at the time of such delivery. *Twitchell-Champlin Co.* v. *Radovsky*, 72.
Delivery of deed, see DEED, 2.

SAVINGS BANK.

1. After a receiver of a trust company has been appointed and has collected practically all of its assets and has distributed to the depositors a dividend comprising a part only of the amounts due to them, so that, in order to pay to the depositors the balance due them, it has become necessary to enforce against the stockholders the liability created by R. L. c. 116, § 30, a depositor, although the receivership proceedings still are pending and the company has in its possession nothing which can be attached or taken on execution, may maintain an action at law against the corporation for the sole purpose of laying the foundation of enforcing under R. L. c. 110, § 60, the liability of the stockholders by recovering a judgment against the corporation, causing a demand to be made on an execution, and the execution to be returned wholly unsatisfied after thirty days. *Coyle* v. *Taunton Safe Deposit & Trust Co.* 441.

SHADE TREES.

1. Review by RUGG, J., of the statutes and decisions relating to shade trees. *Wright* v. *Chelsea*, 460.
Liability of city for injury due to blowing off of limb of shade tree known to be decayed and dangerous, see WAY, 12.
Respective duties of tree wardens, foresters and park commissioners in regard to shade trees, bushes or other trees than shade trees in towns and cities, see MUNICIPAL CORPORATIONS, 4.

SNOW AND ICE.

See NEGLIGENCE, 7.

STATUTE.

Validity.

Invalidity of amendment of R. L. c. 165, § 31, by St. 1908, c. 253, making certain requirements of clerks of courts in the several counties with regard to naturalization fees received by them under 34 U. S. Sts. at Large,

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c. 3592, and possible way of accomplishing same result by proper legislation, see CONSTITUTIONAL LAW, 5–7.

Construction.

Instance where this court refused to change established construction of statute to conform to changes in conditions of civilization relating to subject matter thereof, see RAILROAD, 3.

Certain special act as to grade crossings which was held not to take crossings referred to therein out of operation of general laws, see GRADE CROSSING ACTS, 1.

Construction of St. 1909, c. 490, Part III. §§ 39, 56, imposing excise tax upon foreign corporations described in St. 1903, c. 437, § 58, so that it does not apply to foreign corporation which conducts within this Commonwealth as its principal function some kind of interstate commerce, and so that therefore it does not constitute interference with interstate commerce and is constitutional; and application of statute thus construed, see TAX, 2–4.

STATUTE OF FRAUDS.

See FRAUDS, STATUTE OF.

STATUTES CITED AND EXPOUNDED.

See pages 757–762.

STREET RAILWAY.

Excise tax on street railway company, see TAX, 1.

Whether surface car belonging to elevated railway company, while it is going up incline to elevated station, is "elevated train" or "elevated car" within R. L. c. 106, § 71, as amended by St. 1908, c. 420, see NEGLIGENCE, 13, 14.

Statement by RUGG, J., of principles of law governing liability of street railway companies for personal injuries received by passengers and due, not to instrumentalities or employees of company, but to acts and conduct of other passengers or strangers, see NEGLIGENCE, 33.

Constant stopping and starting of electric street car with jerky movement to avoid collisions with persons, vehicles and cars as car passes along public street in front of theatre from which crowds are emerging does not in itself constitute evidence of negligence of motorman, see NEGLIGENCE, 20.

In present state of transportation facilities it is not negligence for corporation operating street railway to permit passengers to come upon its cars when they already are crowded, see NEGLIGENCE, 24.

Woman voluntarily so doing assumes risk incident to crowded condition, see NEGLIGENCE, 25.

Application of foregoing principles, see NEGLIGENCE, 26, 27.

Actions against street railway companies for personal injuries or death alleged to have been caused by negligence or gross negligence of themselves or of their servants or agents, see NEGLIGENCE, 20–36.

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STRIKE.

See LABOR UNION, 1–7; EQUITY JURISDICTION, 14, 15.

Facts justifying conclusion that certain strike had ceased at certain time; and ruling that driving about streets of wagon bearing placard that such strike still was in progress was unjustifiable and intended to injure employer at whose place of business strike had been in progress, see LABOR UNION, 8–10.

SUPERIOR COURT.

Jurisdiction.

Certain informalities in selecting members of grand and traverse juries were held not to deprive Superior Court of jurisdiction of indictment for murder returned by grand jury or to invalidate trial before traverse jury, see JURY AND JURORS, 1, 2, 4.

Nor did court lose jurisdiction in such case by mere fact that one of such jurors removed from county after he was chosen as juror but before he served as such, see JURY AND JURORS, 3.

Action of judge of Superior Court in allowing motion of deputy sheriff to amend return made by him on execution so that it would read that he had levied on interest of debtor in certain real estate at time of certain attachment instead of at time of levy, which was held to have been within judge's power and to have been warranted, see EXECUTION, 2.

SUPREME JUDICIAL COURT.

Supreme Judicial Court has no power to issue writ of mandamus addressed to Governor regarding any of his official duties, see GOVERNOR, 1.

SURETY.

Various matters determined in action by town against surety upon bond of one who had contracted to construct conduit for its water supply, see CONTRACT, 14, 15; MUNICIPAL CORPORATIONS, 6; DAMAGES, 1; BOND, 1.

TAX.

Assessment.

Lack of authority of town to pay assessors for doing work relative to assessment of next year after completing assessment for current year, see MUNICIPAL CORPORATIONS, 2.

Regarding right of town to compensate assessors for extraordinary work as to current year, see MUNICIPAL CORPORATIONS, 3.

Betterment.

Liability of tenant under St. 1871, c. 382, § 9, for increased rent due to betterment tax assessed and paid by landlord during term of lease, see LANDLORD AND TENANT, 4.

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Excise Tax on Street Railway Company.

1. Under St. 1906, c. 463, Part III. §§ 134, 135, in computing the excise tax which is to be assessed by the assessors of every city and town in which a street railway is operated on each street railway company operating a railway therein of an amount equal to such proportion of the percentages named in the statute of the gross receipts of such company as the length of tracks operated by it in public ways and places of such city or town bears to the total length of tracks operated by it in public ways and places, the gross earnings of such a company, actually operating its road on the thirtieth day of September in any year, must be ascertained by dividing its total gross receipts for the preceding year by the number of miles of its tracks upon that day, regardless of the changes in its mileage that have taken place during the year by reason of consolidation or otherwise. *Natick & Cochituate Street Railway* v. *Wellesley*, 514.

Excise Tax on Foreign Corporation.

2. It is not to be inferred that the Legislature intended that St. 1909, c. 490, Part III. §§ 39, 56, imposing an excise tax upon the foreign corporations described in St. 1903, c. 437, § 58, should go beyond the constitutional authority of the Commonwealth and levy a tax upon a foreign corporation having a usual place of business within this Commonwealth and conducting here as its principal function some kind of interstate commerce. *Baltic Mining Co.* v. *Commonwealth*, 381.
3. A corporation, which was organized under the laws of Michigan for the purpose of mining, producing and selling copper and which operates in Michigan a mine and plant for the mining, producing, smelting and refining of copper and sells its product exclusively through another corporation organized in New Jersey for delivery to persons residing in Massachusetts and the other States and in foreign countries, not more than five per cent of the sales being consummated in Massachusetts, and which maintains in this Commonwealth a usual place of business consisting of an office in Boston for the use of its president and treasurer and for the general financial management and direction of its affairs, for meetings of its board of directors and for the transfer of its stock, is not so engaged in interstate commerce as to preclude this Commonwealth from levying upon it an excise tax and providing that the collection of such tax may be enforced by restraining the further prosecution of the business of the corporation in this Commonwealth. *Attorney General* v. Electric Storage Battery Co. 188 Mass. 239, followed; and Western Union Telegraph Co. v. Kansas, 216 U. S. 1, and Pullman Co. v. Kansas, 216 U. S. 56, distinguished. *Ibid.*
4. St. 1909, c. 490, Part III. §§ 39, 56, imposing an excise tax upon the foreign corporations described in St. 1903, c. 437, § 58, is inapplicable to a foreign corporation, for the taxation of which there is no special provision in our statutes and which is engaged in conducting some kind of interstate commerce for hire as its principal function, and at the same

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Tax (*continued*).

time is engaged in intrastate business so closely connected with the interstate commerce that it could not be given up without serious detriment to the interstate commerce. *Baltic Mining Co.* v. *Commonwealth*, 381.

On Legacies and Successions.

5. By St. 1909, c. 527, § 8, a succession tax is imposed on property received by the heirs of the settlor under a provision of a deed of trust, made in 1844, by reason of the failure of the beneficiary for life, who died after the passage of the statute, to exercise a power of testamentary appointment given to her by the deed of trust. *Minot* v. *Treasurer & Receiver General*, 588.
6. It is within the constitutional power of the Legislature to declare that property, which is subject to disposition by testamentary appointment and in default of such appointment is to go to certain persons or to a class of persons named, does not vest in anybody as to its possession and enjoyment until the donee of the power of appointment exercises the power or dies without exercising it, and that when such property vests in possession, either by reason of an exercise of the power or by reason of a failure to exercise it, a succession tax shall be imposed; and therefore the provision to this effect in St. 1909, c. 527, § 8, is constitutional. *Ibid.*
7. Under St. 1907, c. 563, § 1, as amended by St. 1909, c. 268, and St. 1909, c. 527, § 1, promissory notes owned and possessed by a testator in another State at the time of his death there, which are secured by mortgages on real estate in Massachusetts, are "property within the jurisdiction of the Commonwealth" and therefore are subject to the tax on legacies and successions. *Kinney* v. *Treasurer & Receiver General*, 368.
8. Promissory notes owned and possessed by a testator in another State at the time of his death there, which are secured by mortgages upon real estate in Massachusetts, are in the jurisdiction of this Commonwealth so as to subject them to a succession tax here within the doctrine of the Constitution of the United States that allows States to impose taxes only upon persons or property within their jurisdiction. *Ibid.*
9. Under St. 1907, c. 563, § 1, as amended by St. 1909, c. 268, and St. 1909, c. 527, § 1, a promissory note owned and possessed by a testator in another State at the time of his death there, which is secured by the assignment of a deposit book representing an interest in the funds of a voluntary association held in Massachusetts by trustees "for the purpose of investing in real and personal estate" and "invested principally" in real estate in this Commonwealth, is "property within the jurisdiction of the Commonwealth" and therefore is subject to the tax on legacies and successions. *Ibid.*
10. The question, whether promissory notes owned and possessed by a testator in another State at the time of his death, which are secured by a transfer of property which only can be forced to be applied to the payment of the notes by the aid of the Massachusetts courts, are for that reason within the jurisdiction of this Commonwealth so as to subject them to a succes-

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sion tax under our laws, here was mentioned as having been raised in argument but was not passed upon. *Kinney* v. *Treasurer & Receiver General*, 368.

Sale.

Liability of municipality to repay to purchaser of defective tax title amount paid by him, see MUNICIPAL CORPORATIONS, 10, 11.

Liability of Municipality to Purchaser of Defective Tax Title.

See MUNICIPAL CORPORATIONS, 10, 11.

TELEGRAPH.

1. Vermilye *v.* Postal Telegraph Cable Co. 205 Mass. 598, affirmed. *Vermilye* v. *Western Union Telegraph Co.* 401.
2. Although it is settled, that telegraph lines extending through different States for use in the ordinary way are instruments of commerce, and that messages passing over them from one State to another in the transaction of business are a part of interstate commerce that is entitled to the protection of the Constitution of the United States, yet it also is well settled, that a statute like R. L. c. 122, § 9, requiring a telegraph company to receive despatches upon payment of the usual charges according to the regulations of the company and to transmit them faithfully and impartially, so long as Congress has passed no law upon the subject, is not a regulation of interstate commerce within the meaning of the constitutional provision, but is a proper police regulation for the enforcement of the rules and policy of the common law, which affects interstate commerce only incidentally. *Ibid.*
3. In an action against a telegraph company under R. L. c. 122, §§ 9, 10, for wrongfully refusing to transmit for the plaintiff a telegram written upon a blank of the defendant to which the plaintiff had attached a small sticker containing a notice that the message was a business one and that a failure to deliver it promptly would cause the sender financial loss, the defendant relied on the following rule: "Messages to be on message forms. Each message for transmission will be written upon the form provided by the company for that purpose, or will be attached to such form by the sender or by the person presenting the message as the sender's agent, so as to leave the printed heading in full view above the message." It appeared that the plaintiff had no knowledge of the rule when he presented his message, that the rule was in a tariff book, which was open to the public in the defendant's office but which the defendant otherwise did nothing to call to the attention of the public. Inspection of the traffic book showed that the rule quoted above was a rule of the receiving department and was intended for the use and guidance of the company's agents and not for the public. The judge, who tried the case without a jury, found as facts, that the presence of the sticker on the telegram blank had no tendency to confuse the defendant's operator or to increase the probability of error or delay in transmitting the message, and that it did not obscure the printed

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heading above the message. The defendant contended that the rule forbade the sender of a message to put anything upon the face of the blank except the message, the date, and the name and address of the person to whom it was to be sent, and that the sticker and notice attached to the plaintiff's telegram were in violation of the rule. The defendant offered testimony that the defendant and its agents always had put this construction on the rule. The judge excluded the testimony and ruled that the construction put upon the rule by the defendant and its agents did not affect the rights of the plaintiff. He found as a fact that the rule was not intended for the public and ruled that it did not have the meaning which the defendant contended for, and that it was not a justification for the defendant's refusal to transmit the message. *Held*, that the findings of the judge were justified and that his rulings were correct; that the defendant's construction of the rule was immaterial, and that, even if the rule could have affected the plaintiff who had no knowledge of it, it merely required that messages should be written upon the forms provided for the purpose and did not forbid the writing or pasting of any other unobjectionable matter upon the same paper in such a way as not to mislead the defendant's agents or cause them inconvenience in the performance of their duties. *Vermilye* v. *Western Union Telegraph Co.* 401.

Certain ordinances of the city of Chicopee regulating placing and maintenance of telegraph and other electric wires in public streets of city, which were held to be within authority given by R. L. c. 25, § 54; c. 26, §§ 2, 6, and not to be infringement upon exclusive jurisdiction of Congress to deal with interstate commerce; so that, when telegraph company had complied with ordinance and under its provision had permitted city's wires to be put upon its poles for many years, it was not allowed by suit in equity to compel city to remove them, even though, under circumstances of case, presence of city's wires was technical invasion of company's rights, see MUNICIPAL CORPORATIONS, 7–9.

TOWNS AND CITIES.

See MUNICIPAL CORPORATIONS.

TREE WARDEN.

Respective duties of tree wardens, foresters and park commissioners in regard to shade trees, bushes and trees other than shade trees in towns and cities, see MUNICIPAL CORPORATIONS, 4.

TRESPASS.

Questions which arose at trial of action for damages resulting from continuing trespass of defendant in maintaining part of foundation of building upon plaintiff's land, see NUISANCE, 1; EVIDENCE, 3.

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TRUST.

Construction.

1. A will contained the following provision: "I give to S. my adopted daughter the sum of $10,000; and to E., also my adopted daughter, $7,000; the income of which if not needed for their support, and schooling to be added to the principal during their minority; and at the age of twenty-one they to receive the income of the several amounts devised to them during the remainder of their lives; and sooner, if married before the age of twenty-one, at the time of said marriage; in case of the death of either of them before they come of age or are married, the said sum or sums to be appropriated for the establishment of an asylum in Andover for the benefit of orphans and indigent children under the direction of my trustees or executors; and in case of their death or the death of either of them, leaving children, the said amount to go to the said children." There were numerous legacies to relatives and friends of the testator, and residuary clauses disposing of all his estate not otherwise disposed of. E. died when more than twenty-one years of age, never having married, S. in the meantime having died leaving children. *Held*, that the sums given in trust for E. and S. were to be disposed of independently of each other, and that the children of S. had no interest in the sum left in trust for E. and her children if she had any. *Clarke* v. *Andover*, 91.

Who was beneficiary designated in direction to trustee to pay residue of estate "to the Massachusetts Hospital for diseased and wounded soldiers," see DEVISE AND LEGACY, 5.

Void because Object Indefinite.

Trust in will for charitable purpose which failed because object could not be defined or designated except by resort to oral communications made by testator in lifetime, see *post*, 2.

Resulting.

2. A clause of a will gave the residue of the estate of the testator, which consisted of both realty and personalty, to the person named as executor "in trust, nevertheless, to carry out certain other purposes of mine mentioned to him and to A. . . . and relating to certain benevolent and charitable institutions and associations; to a clock tower and clock in memory of my sister B.; to the use of our old homestead estate as a memorial to my mother to be known as the 'Eliphal Tucker Borden Park Play Grounds' et cetera." *Held*, that, since resort could not be had to the oral communications of the testator in order to ascertain the objects of the charity, the trust was so indefinite that it could not be executed, and that therefore a resulting trust for the benefit of the heirs at law and next of kin of the testator arose. *Wilcox* v. *Attorney General*, 198.

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Appointment of Trustee.

3. A trustee under a will, who held a trust fund for the purpose of paying the income thereof to a certain beneficiary during his life and thereafter to distribute it among certain societies and corporations, died after the life beneficiary without having distributed the principal. A successor was appointed, who died without having taken possession of the fund. Thereafter the Probate Court by a decree, which, upon petition by one of the ultimate beneficiaries under the will, this court held should be vacated because of lack of notice to certain parties, undertook to appoint a succeeding trustee. The executor of the will of the trustee who last had possession of the trust fund sought by a bill in equity instructions as to what disposition he should make of the fund, and this court, having determined the questions of construction of the will which were raised by the parties, directed such executor to distribute the fund accordingly, and *held*, that there was no occasion for the appointment of another trustee. *Clarke* v. *Andover*, 91.

Appointment of trustee which was held invalid, because proper notice to beneficiaries was not given, see PROBATE COURT, 1.

Tax.

Succession tax imposed by St. 1909, c. 527, § 8, upon property received by heirs of settlor under trust deed, made in 1844, by reason of failure of beneficiary for life, who died after passage of statute, to exercise power of testamentary appointment given by deed of trust, see TAX, 5, 6.

Unauthorized Note of Trustee.

4. If a trustee, who has no authority to borrow money for the trust estate, borrows money and gives a promissory note in the name of the estate signed by him as trustee, the note is the individual note of the person who signed it as trustee, and the holder of the note has no remedy against the trust estate, unless that estate is indebted to the trustee and the holder of the note has an equitable right to stand in the trustee's shoes, which here was not the case. *Dunham* v. *Blood*, 512.

Effect of Mistake of Trustees.

5. A beneficiary of a trust under a will, who also is one of three trustees under the same will, does not lose any of his rights as a beneficiary on account of a loss incurred by the trust estate by reason of a mistake of judgment of the trustees, in which he shared as a trustee but for which neither he nor the other trustees were liable under the terms of the trust. *Reggio* v. *Warren*, 525.

Bill in equity by beneficiary under trust against trustees to set aside release given by plaintiff to defendants and to rescind transaction in which it was given on ground that parties were acting in transaction under mistake and that it resulted in unjust enrichment of trust, see EQUITY JURISDICTION, 10–13.

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TRUSTEE PROCESS.

Where necessary household goods less than $300 in value are in hands of one who is served upon as trustee in writ of trustee process against owner of goods as defendant, replevin will not lie by owner to get possession of goods, see REPLEVIN, 1.

Provision of St. 1907, c. 582, § 19, excusing warehouseman from liability for refusing to deliver goods deposited with him, adversely claimed, until he has had reasonable time to ascertain validity of adverse claim, has no application to refusal of warehouseman to deliver goods attached in his hands by trustee process as property of depositor, see WAREHOUSEMAN, 1.

UNJUST ENRICHMENT.

Bill in equity by beneficiary under trust against trustees to set aside release given by plaintiff to defendants and to rescind transaction in which it was given on ground that parties were acting in transaction under mistake and that it resulted in unjust enrichment of trust, see EQUITY JURISDICTION, 10–13.

UNLAWFUL INTERFERENCE.

See LABOR UNION, 1–10; EQUITY JURISDICTION, 14, 15.

USAGE.

Construction of contract of sale according to understanding of trade, see SALE, 1.

VAGABOND.

Certain complaint for vagabondage was held to be proper, and statute upon which it was based was held to be constitutional, see PLEADING, CRIMINAL, 1; CONSTITUTIONAL LAW, 2, 8.

VERDICT.

See PRACTICE, CIVIL, 7, 17, 22; CONSTITUTIONAL LAW, 10, 11.

WAGES.

Assignment of, see ASSIGNMENT, 1, 2.

WAIVER.

Defendant in criminal complaint which charged a single offense, who did not except to refusal of judge presiding at trial to compel Commonwealth to elect at close of its case as between two offenses of same nature which Commonwealth's evidence tended to prove, did not thereby waive his right to renew his motion at close of all evidence, see PRACTICE, CRIMINAL, 1–3.

Waiver, by chairman of committee on water supply of town, of provisions of contract made by committee for town with contractor for construction

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of conduit, does not bind town or other members of committee, see MUNICIPAL CORPORATIONS, 6.

WAREHOUSEMAN.

1. Although it here was said, that the provision of St. 1907, c. 582, § 19, excusing a warehouseman from liability for refusing to deliver goods deposited with him, adversely claimed, until he has had a reasonable time to ascertain the validity of the adverse claim, has no application to the refusal of a warehouseman to deliver goods attached in his hands by trustee process as the property of the depositor, the refusal of the trial judge in the present case to give an instruction to this effect was held not to be a sufficient ground for sustaining an exception, because the refusal of the defendant to deliver the goods to the plaintiff was justified on other grounds independent of the statute referred to, so that the error of the judge in refusing to give the instruction did not and could not have operated prejudicially to the plaintiff. *Cushman* v. *Boston Storage Warehouse Co.* 407.

WARRANTY.

See SALE, 6, 7.

WATER SUPPLY.

Waiver, by chairman of committee on water supply of town, of provisions of contract made for town by committee with contractor for construction of conduit, does not bind town or other members of committee, see MUNICIPAL CORPORATIONS, 6.

WAY.

Private.

Creation of easement.

1. It is to be assumed that the phrase "together with a privilege or passage way from said Creek into Town River," in a deed made in 1834 conveying a tract of land bounded on the south by a highway and on the north by the centre of a creek lying just below high water mark in flats which extended a long distance to Town River, an arm of the sea, was intended to confer upon the grantee a right which otherwise he would not have had. *Old Colony Street Railway* v. *Phillips*, 174.
2. A phrase in a deed, "together with a privilege or passage way [over certain flats lying between high and low water] from said creek into" an arm of the sea, is not void for indefiniteness if the uses intended by the parties can be adjudged by the aid of the circumstances, although the limits or location of the way have not been determined by the parties by a use or otherwise, because under such circumstances the location must be governed by what is reasonable, which may be judicially determined without adding to the grant. *Ibid.*
3. The owner of a tract of land, bounded on the south by a highway and on the north by an arm of the sea called Town River, and containing within

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its area upland by the highway, and flats between the upland and low water mark of the arm of the sea, which a "Creek," so called, which was dry at low tide, crossed from east to west just below high water mark, in 1834 conveyed to a shipwright a portion of the tract, bounded on the south by the highway and on the east and north by a line described in the deed as follows: "Thence northerly . . . to a stake in the centre of a creek. Thence easterly along the centre of said Creek. . . ." The deed after the description read as follows: "Together with a privilege or passage way from said Creek into Town River." Access to Town River from the land so conveyed to him, upon which he built a shipyard and plied his trade, was necessary to the shipwright in his business. In 1907, one who had become the owner of the remaining flats petitioned in the Land Court to have his title registered. The judge of the Land Court, subject to an exception by the petitioner, ruled that the "passage way" named in the deeds "was intended to be a way by water from the creek out to the river." *Held*, that the language of the deed to the shipwright granted a right of passage over the flats, whether bare or covered with water, at any and all times and by any reasonable method of travel, which was an easement appurtenant to the land conveyed by the deed. *Old Colony Street Railway* v. *Phillips*, 174.

Extent of easement.

4. Whether the reasonable use of a right of way over a strip of land ten feet wide belonging to the owner of the adjoining lot on a city street, which leads along a division fence to the street, is inconsistent with the maintenance by the owner of such adjoining land of suitable gates at the ends of the way in the division fence and upon the street, where the manner of use is wholly undefined by the deed granting the right of way, besides a question of law involves the question of fact, what is a reasonable use of the property of the respective parties. *Blais* v. *Clare*, 67.
5. Upon a question, whether the reasonable use of a right of way over a strip of land ten feet wide belonging to the owner of the adjoining lot on a city street, which leads along a division fence to the street, is inconsistent with the maintenance by the owner of such adjoining land of suitable gates at the end of the way in the division fence and upon the street, where the deed granting the right of way merely used the words "Together with a right of way over a strip of my land next adjoining the above lot, ten feet wide, and extending back from the street seventy-five feet," it is competent for the owner of the servient land, claiming the right to maintain the gates, to show that for at least twenty-five years before the owner of the right of way purchased his lot, including a period when the two lots were owned by the same person but were occupied by different persons, a driveway for carriages was used very nearly in the place where the way ten feet wide was established by the deed and that gates were maintained in the fence near the boundary line afterwards established by the deed and also at the entrance to the way from the street, the method of using the driveway by former owners and occupants under substantially the same conditions being some evidence of what was reasonable

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Way (*continued*).

and convenient in the occupation and enjoyment of the property. *Blais* v. *Clare*, 67.

Principle upon which such ruling was based, see EVIDENCE, 5.

6. In a suit in equity by the owner of a lot on a street of a city, to restrain the defendant, who was the owner of the adjoining lot over which the plaintiff had a right of way, from obstructing such way by maintaining gates at each end of it, it appeared, by a master's report, that on each of the lots there was a cottage house, the plaintiff's house being about eighteen and a half feet and the defendant's house about sixteen and a half feet from the boundary line, on which there was a fence, that the plaintiff's right of way was created by a grant in these words, "Together with a right of way over a strip of my land next adjoining the above [the plaintiff's] lot, ten feet wide, and extending back from the street seventy-five feet," that the defendant placed and maintained a gate thirteen feet wide in the division fence and also a gate ten feet wide across the entrance to the way from the street on which both lots faced, that the houses on the lots were occupied as the homes of the plaintiff and of the defendant respectively and had yards of considerable size about them, that the street was a much travelled way with an electric car line upon it, that the family of the defendant at times had been annoyed by animals straying from the street upon the defendant's land when the gates were left open and that one member of the defendant's family was a child three years of age, that for at least twenty-five years before the plaintiff purchased his lot a driveway for carriages was used very nearly in the place where the plaintiff's right of way was established by the deed, that during that time gates had been maintained in the fence near the present boundary line and at the entrance to the defendant's lot from the street, and that both of these gates had been kept closed except when the driveway was in use for carriages or teams, that the former occupants of both houses used the driveway for teams but that it was not used generally by persons on foot. The master found upon evidence introduced by the plaintiff, that gates to driveways on premises in the neighborhood usually were kept open by the owners and occupants for their own convenience. The master found that, if the defendant had the right to maintain gates, the gates maintained by him were suitable ones. *Held*, that, on the facts found by the master, a reasonable and proper use of the houses and lands of the parties and of the plaintiff's right of way over the defendant's land permitted the maintenance by the defendant, against the plaintiff's objection, of convenient and suitable gates such as these were found to have been. *Blais* v. *Clare*, 67.

7. In the absence of any controlling reason to the contrary, a right of way, granted in the following phrase after the description in a deed, "together with a privilege or passage way [over certain flats lying between high and low water] from said creek [just below high water] into" an arm of the sea, must be by the straightest and most direct way, and, whether it be by land or sea, it must be by or over the same land and within the same lines. *Old Colony Street Railway* v. *Phillips*, 174.

Construction of decree of Land Court with regard to above right of way, see LAND COURT, 1.

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Continuance.

8. The owner of a tract of land, bounded on the south by a highway and on the north by an arm of the sea called Town River, and containing within its area upland by the highway, and flats between the upland and low water mark of the arm of the sea, which a "Creek," so called, which was dry at low tide, crossed from east to west just below high water mark, in 1834 conveyed to a shipwright a portion of the tract, bounded on the south by the highway and on the east and north by a line described in the deed as follows: "Thence northerly . . . to a stake in the centre of a creek. Thence easterly along the centre of said Creek. . . ." The deed after the description read as follows: "Together with a privilege or passage way from said Creek into Town River." Access to Town River from the land so conveyed to him, upon which he built a shipyard and plied his trade, was necessary to the shipwright in his business. In 1888 the heirs of the shipwright, by a deed containing the same description and language, conveyed the parcel to a diver, who used it in connection with his business, to the conduct of which access to the arm of the sea over the flats north of the creek was necessary. The creek dried up. In 1907 one who had become the owner of the remaining flats petitioned in the Land Court to have his title registered. The judge of the Land Court, subject to an exception by the petitioner, ordered a decree that the title to the petitioner's flats be registered "subject to a right in favor of" the diver to a way by water from the creek out to the river. *Held*, that the existence of the easement was not affected by the drying up of the creek, which was referred to merely as a boundary, nor by the fact that the land was no longer used as a shipyard, since the easement was not confined to such a use. *Old Colony Street Railway* v. *Phillips*, 174.

Public.

Abandonment of layout.

9. A city by an order of its common council in 1883 laid out a public street and established its grades. Within two years thereafter the street was constructed, but a sidewalk in front of a certain lot abutting thereon was one inch below the established grade at one end and ten inches below at the other end. Thereafter until 1905 the street was wrought for travel, a street railway was laid thereon, and water, sewer and gas pipes were laid therein, all in conformity with the grades established in 1883 except as to the sidewalk mentioned. In 1905, the mayor and aldermen passed an order reciting that, "whereas in our opinion public convenience does so require, it is ordered: that the superintendent of streets be . . . directed to complete . . . sidewalks" on the street in question in front of premises which included the lot referred to "and upon the completion of the said work to report to this board a schedule of the cost thereof, in front of the estate of each abutter in said portion of way in front of which the sidewalk is not already completed as aforesaid." Acting under such order a sidewalk was built in front of the lot mentioned at the level established by the order of 1883, which was above the level of the lot, and the owner

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Way (*continued*).

of the lot petitioned for an assessment of his damages. *Held*, that, on the foregoing facts it was not erroneous for a judge, who heard the case without a jury, to find and rule that before the order of 1905 the city had abandoned the mode of construction prescribed in 1883, that the order of 1905 was an original proceeding and that the work done thereunder was not done under the order of 1883, and consequently that the petitioner might recover damages therefor. *Shaughnessy* v. *Brockton*, 123.

Defect.

10. A hole or gully in an earth sidewalk of a much travelled street of a town, caused by a flow of water across the sidewalk, may be found to have been a defect in a public way, and, if it is shown that this condition of things had existed there for a long time and that the authorities of the town knew of its existence or would have known of it if they had exercised due care, the town may be found to be liable to a traveller injured by reason of this defect while in the exercise of due care. *Page* v. *Weymouth*, 325.
11. If a traveller on a public way of a town is injured by reason of a defect therein, consisting of a hole in an earth sidewalk, the fact that he had passed over the hole before on the same day and knew of its existence does not as matter of law preclude him from recovering damages from the town, and, in an action under R. L. c. 51, § 18, for such damages, circumstances may be shown which entitle him to go to the jury on the question whether he was in the exercise of due care. *Ibid.*
12. If a traveller on a highway of a city, while in the exercise of due care, is injured by the falling upon him of a limb of a shade tree, which has been so dangerous by reason of decay that the likelihood of its being blown down by ordinary winds has attracted attention for more than a year, and if the officer whose duty it was to report such a danger to the proper city authorities never has done so, and no attempt has been made to guard the place or to inform the public of the peril, in an action by the traveller against the city for the injuries thus received, it can be found that the injuries were caused by a defect in the highway for which the defendant is liable. *Wright* v. *Chelsea*, 460.

Policing of way.

Fact, that crowd, whose actions resulted in injuries to plaintiff in action by passenger against street railway company, was in public street, did not affect plaintiff's right to recover where action of crowd at that time of day and place were habitually dangerous and defendant knew of that fact and did not guard against it, see NEGLIGENCE, 35.

Wires in way.

Certain ordinances of city of Chicopee regulating placing and maintenance of telegraph and other electric wires in public streets of city, which were held to be within authority given by R. L. c. 25, § 54; c. 26, §§ 2, 6, and not to be infringement upon exclusive jurisdiction of Congress to deal with interstate commerce; so that, when telegraph company had complied with

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ordinance and under its provision had permitted city's wires to be put upon its poles for many years, it was not allowed by suit in equity to compel city to remove them, even though, under circumstances of case, presence of city's wires was technical invasion of company's rights, see MUNICIPAL CORPORATIONS, 7–9.

WILL.

Provision in will for charitable purposes which was inoperative because purposes could not be defined or designated except from oral communications made by testator in his lifetime, see DEVISE AND LEGACY, 1; TRUST, 2.

WIRES.

Certain ordinances of city of Chicopee regulating placing and maintenance of telegraph and other electric wires in public streets of city, which were held to be within authority given by R. L. c. 25, § 54; c. 26, §§ 2, 6, and not to be infringement upon exclusive jurisdiction of Congress to deal with interstate commerce; so that, when telegraph company had complied with ordinance and under its provision had permitted city's wires to be put upon its poles for many years, it was not allowed by suit in equity to compel city to remove them, even though, under circumstances of case, presence of city's wires was technical invasion of company's rights, see MUNICIPAL CORPORATIONS, 7–9.

WITNESS.

As to proper method of examination of expert witness, see EVIDENCE, 11–14.

At trial of indictment against several for conspiracy to steal, members of conspiracy are competent witnesses against co-conspirators, see CONSPIRACY, 5.

Effect of fact that testimony of witness for Commonwealth at trial for murder tended to contradict testimony of other witnesses, and right of Commonwealth to produce witness to contradict others of its witnesses under provisions of R. L. c. 175, § 24, see HOMICIDE, 8, 10, 15.

WORDS.

"And." See *Clarke* v. *Andover*, 91, 96; *Reagan* v. *Union Mutual Life Ins. Co.* 79, 84, 85.

"Appeared from the evidence." See *Neal* v. *Scherber*, 323, 325.

"Elevated car." See *Dow* v. *Boston Elevated Railway*, 486, 488.

"Elevated train." See *Dow* v. *Boston Elevated Railway*, 486, 487, 488.

"Foregoing legacy." See *Sias* v. *Chase*, 372, 377.

"Foreign corporations." See *Baltic Mining Co.* v. *Commonwealth*, 381, 386.

"Further assets." See *Fay* v. *Haskell*, 207, 212, 213, 214, 215, 218.

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Words (*continued*).

"Massachusetts Hospital." See *Mason* v. *Massachusetts General Hospital*, 419, 422, 423.
"New assets." See *Fay* v. *Haskell*, 207, 213, 214, 215, 216, 217.
"Or." See *Clarke* v. *Andover*, 91, 96; *Reagan* v. *Union Mutual Life Ins. Co.* 79, 84, 85.
"Perfect satisfaction." See *Tobin* v. *Kells*, 304, 311.
"Repair." See *Perry* v. *J. L. Mott Iron Works Co.* 501, 505.
"Said." See *Commonwealth* v. *Richmond*, 240, 243.
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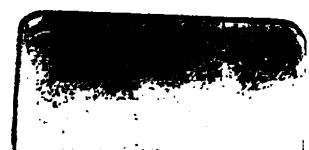

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